85-646

No. .....

Supreme Court, U.S.
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CLERK

In The
Supreme Court of the United States
October Term, 1985

HENRY WADE,
Petitioner,

v.

STEPHEN C. CRANE, on behalf of himself and others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY WADE
District Attorney
Dallas County, Texas

SUE LAGARDE
Chief Felony Prosecutor
Dallas County, Texas

PETER L. HARLAN
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COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

1. Whether a Texas District Attorney is immune from a civil claim for damages arising from the performance of his official duties to initiate or present the state's case in a criminal prosecution?

2. Whether a Texas District Attorney is a state officer whose official acts constitute state action and is accordingly immune from a civil claim for damages under the Eleventh Amendment to the United States Constitution?

LISTING OF PARTIES

PETITIONER:

Henry Wade
Criminal District Attorney
Dallas County, Texas

ATTORNEYS FOR PETITIONER:

Sue Lagarde
Chief Felony Prosecutor
Dallas County, Texas

Peter L. Harlan
Assistant District Attorney
Dallas County, Texas

RESPONDENTS:

Stephen C. Crane, on behalf of himself and others similarly situated

ATTORNEYS FOR RESPONDENTS:

Johnston Larson & Trantham
Douglas Larson

Hicks Gillespie James & Lesser, P.C.
Peter Lesser

INTERESTED PARTIES:

State of Texas

Earl Bullock, Dallas County Clerk
L. E. Murdoch, Former Dallas County Clerk

Dallas County, Texas

Ben Ellis, Judge, Dallas County Criminal Court No. 1
John Orvis, Judge, Dallas County Criminal Court No. 2
Mike Schwille, Judge, Dallas County Criminal Court No. 3
Berlaind Brashear, Judge, Dallas County Criminal Court No. 6
John McCall, Judge, Dallas County Criminal Court No. 7

ATTORNEYS FOR INTERESTED PARTIES:

Jim Mattox—Attorney General of Texas
Larry King—Assistant Attorney General
Henry Wade—Dallas County Criminal District Attorney
Sue Lagarde—Dallas County Assistant District Attorney
Peter Harlan—Dallas County Assistant District Attorney
Earl Luna—Law Offices of Earl Luna, P.C.
Robert E. Luna—Law Offices of Earl Luna, P.C.
Mary Milford—Law Offices of Earl Luna, P.C.

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No. .....

In The
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HENRY WADE,

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v.

STEPHEN C. CRANE, on behalf of himself and others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on May 2, 1985, rehearing en banc and panel rehearing denied July 22, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit filed May 2, 1985, reported at 759 F.2d 412 is reprinted in Appendix A.

The opinion of the United States Court of Appeals for the Fifth Circuit, filed July 22, 1985, denying Petition for Rehearing and Suggestion for Rehearing En Banc, reported at 766 F.2d 193, is reprinted in Appendix B.

The Memorandum Opinion of the United States District Court for the Northern District of Texas, Dallas Division, filed March 11, 1982, reported at 534 F.Supp. 1237, is reprinted in Appendix C. The Judgment, filed August 16, 1983, is reprinted in Appendix D. The Judgment declaring the rights and liabilities of the parties to be those expressed in the District Court's Memorandum Order of November 30, 1981, is reprinted in Appendix E, and its Order of February 4, 1982 denying injunctive relief, is reprinted in Appendix F. The Judgment assessing attorneys' fees against the State of Texas pursuant to the District Court's Memorandum Order of September 8, 1982, is reprinted in Appendix G, and its unpublished Memorandum Opinion of July 26, 1983, is reprinted in Appendix H.

GROUNDS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, filed May 2, 1985, reported at 759 F.2d 412, is reprinted in Appendix A.

The opinion of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Suggestion for Rehearing En Banc was entered on July 22, 1985, and this Petition for a Writ of Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

TEX. CRIM. PROC. CODE ANN. art. 23.01 (Vernon 1966)

A "capias" is a writ issued by the court or clerk and directed "To any peace officer of the State of Texas", commanding him to arrest a person accused of an offense and bring him before that court immediately, or on a day or at a term stated in the writ.

TEX. CRIM. PROC. CODE ANN. art. 23.02 (Vernon 1966)

A capias shall be held sufficient if it have the following requisites:

1. That it run in the name of "The State of Texas";

2. That it name the person whose arrest is ordered, or if unknown, describe him;

3. That it specify the offense of which the defendant is accused, and it appear thereby that he is accused of some offense against the penal laws of the State;

4. That it name the court to which and the time when it is returnable; and

5. That it be dated and attested officially by the authority issuing the same.

TEX. CRIM. PROC. CODE ANN. art. 23.04 (Vernon 1966)

> In misdemeanor cases the capias or summons shall issue from a court having jurisdiction of the case. The summons shall be issued only upon request of the attorney repesenting the State and shall follow the same form and procedure as in a felony case.

———o———

STATEMENT OF THE CASE

L. L. Huckaby, a member of the City of Dallas Police Department, made an Affidavit of Complaint and swore to the same before Lem Brotherton, Assistant District Attorney of Dallas County, Texas, which was as follows:

> FILING AGENCY DPD DATE FILED 4-16-80
>
> COURT CC COMPLAINANT A. PEREZ
>
> MA80023927
>
> AFFIDAVIT
>
> In the Name and by the Authority of the State of Texas.
>
> PERSONALLY APPEARED before me the undersigned authority this affiant, who after being by me duly sworn, deposes and says your Affiant has good reason to believe and does believe that one STEPHEN CLARKSON CRANE hereinafter styled Defendant, heretofore, on or about the 3rd of April A.D. 1980, in the County of Dallas and State of Texas, did unlawfully then and there knowingly promote, to-wit: exhibit, obscene material, to-wit: one untitled 8mm film, to A. Perez, knowing the character and content of said obscene material, to-wit: depictions of sexual intercourse and deviate sexual intercourse between human beings, Against the peace and dignity of the state.
>
> /s/ L. L. Huckaby

Sworn to and subscribed
before me this the 16th
day of April, A.D. 1980,
/s/ Lem Brotherton,
Assistant Criminal
District Attorney of
Dallas County, Texas

This Affidavit was entered into evidence as Plaintiff's Exhibit 1. The complaint on Crane was one of 800 to 1,000 received each week by the District Attorney's office from the Dallas Police Department alone. (R. Vol. XII at 496).

Based on the Affidavit of Complaint, the Dallas County District Attorney's office prepared an Information and filed said Information and Affidavit with the County Clerk of Dallas County, Texas.[1] After receiving the Affidavit and Information, the County Clerk issued a capias writ which commanded any Sheriff or any Constable in the State of Texas to bring Crane, instanter, before the County Criminal Court of Dallas County, Texas. The capias is included in Appendix J.

Crane was arrested by the City of Dallas Police. (R. Vol. XIII at 707). Crane advised the officers that it was not necessary to read him his rights because he was a lawyer and already knew his rights. (R. Vol. XIII at 716-717). Crane, therefore, opted to be released on a habeas corpus bond rather than having a hearing where the magis-

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1 The Information is included in Appendix I.

trate would examine the accusations against him.[2] Crane knew that the practice of the Dallas Police Department was to take an arrested person to a magistrate shortly following his arrest unless the suspect wished to opt for release on bond and waive the hearing. (R., Vol. VI at 107).

The criminal charges against Crane were dismissed on April 28, 1980, at the request of the District Attorney. (R. Vol. VI at 49-50). Approximately three months thereafter, Crane filed this civil action against the State of Texas, the Judges of the County Criminal Courts of Dallas County, Texas, the Clerk of the County Court of Dallas County, Texas, the District Attorney of Dallas County, Texas, the City of Dallas, Texas, and three of its police officers pursuant to 42 U.S.C. §§ 1983, 1985, 1988 and the common law of Texas. Crane sought declaratory and injunctive relief as well as monetary damages.

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[2] Art. 15.17 of the Texas Code of Criminal Procedure provides, in part, as follows:

> (a) In each case enumerated in this Code, *the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate* of the county where the accused was arrested. *The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith* . . . (Emphasis added).

Art. 16.01 of the Texas Code of Criminal Procedure provides, in part, as follows:

> When the accused has been brought before a magistrate for an examining trial, that officer *shall proceed to examine into the truth of the accusation made,* allowing the accused, however, sufficient time to procure counsel. In a proper case, the magistrate may appoint counsel to represent an accused in such examining trial only to be compensated as otherwise provided in this Code. (Emphasis added).

Art 15.17 and Art. 16.01 are included in Appendix K.

In an order entered November 30, 1981, the District Court concluded that the challenged capias procedure violated Texas law for the reason that a determination of probable cause was not made by a neutral and detached magistrate prior to the issuance of the capias. See order below, Appendix E.

In accordance with the District Court's suggestion in its order to submit a new plan for issuing capias, the District Attorney changed the system by which a misdemeanor capias was issued. This plan was approved by the District Court and, accordingly, the Respondent's request for injunctive relief was denied on February 4, 1982. See order below, Appendix F.

At the conclusion of the subsequent trial on the issue of damages, the jury awarded Respondent Crane $40,000 in damages. The District Court in its Memorandum Opinion dated March 11, 1982, held that all Defendants were immune from damages and accordingly entered a judgment notwithstanding the jury verdict in this respect. See District Court opinion, Appendix C; 534 F.Supp. 1237-1247.

Thereafter, in a Memorandum Order dated September 8, 1982, the District Court ruled that Crane was a "prevailing plaintiff" under 42 U.S.C. § 1988, and was, therefore, entitled to attorneys' fees. See District Court order, Appendix G. The order also held that the District Attorney and the County Clerk were acting as state officials during the relevant times involved in this suit and accordingly assessed the attorneys' fees against the State of Texas. See District Court order, Appendix G.

The Fifth Circuit subsequently held that the Dallas County system of issuing misdemeanor capias violated

both the Texas statutory law and the United States Constitution. See Panel opinion below, Appendix A; 759 F.2d at 426, 432.

The panel reversed the trial court's finding that Dallas County and the District Attorney were *immune* from liability for money damages. The panel, therefore, reinstated the jury's award of money damages against the District Attorney in his official capacity. See opinion below, Appendix A; 759 F.2d at 432. The panel, in holding the District Attorney liable in his official capacity, also held that he was a county official and not a state official, and therefore, was not entitled to Eleventh Amendment immunity. Although it was claimed and argued by Defendants that the District Attorney also had prosecutorial immunity in this suit, the Fifth Circuit ignored that defense and its own holding in prior cases finding that a state prosecutor had immunity from damage claims on this basis.[3] See opinion below, Appendix A; 759 F.2d at 432. [A Texas district attorney is a state officer. *See* Tex. Atty. Gen. Op. No. H-656 (1975), Appendix L.] In addition, the panel held the County liable for the reason that the District Attorney purportedly was responsible for the defective capias procedure, and therefore reasoned that his decision "must be considered official policy attributable to the County." See opinion below, Appendix A; 759 F.2d at 430.

Accordingly the panel also reversed the assessment of the attorneys' fees against the State of Texas and rendered the same against the County. See opinion below, Appendix A; 759 F.2d at 432.

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[3] *Smart v. Jones*, 530 F.2d 64 (5th Cir. 1976), *cert. denied*, 42 U.S. 1125.

REASONS FOR GRANTING WRIT

A writ of certiorari should be granted to resolve the questions presented in this Petition for the following reasons, to-wit:

The United States Court of Appeals for the Fifth Circuit has effectively abolished the well-established doctrine of prosecutorial immunity by its decision herein. As a result, the court has unreasonably exposed state prosecutors in this circuit and others to civil liability for damages arising from their official acts taken to initiate or present the state's case in a criminal prosecution.

Moreover, the court has ignored the overwhelming weight of authority in Texas which has held that a Texas District Attorney is a state officer and therefore entitled to immunity from damage claims under the Eleventh Amendment to the United States Constitution.

The panel decision of the Fifth Circuit in this proceeding is in direct conflict with the opinion of this Court in *Imbler v. Pachtman,* 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976), which established the well-reasoned doctrine of prosecutorial immunity. In reaching its decision in the case above, this Court stated as follows:

> [Liability under 42 U.S.C. § 1983 would] prevent the vigorous and fearless performance of a prosecutor's duty which is essential to the proper functioning of the criminal justice system.

In the host of cases which have followed the landmark decision of the United States Supreme Court in the *Imbler* case, the doctrine of prosecutorial immunity has been consistently upheld and expanded by the lower courts in other circuits. *Taylor v. Kavanagh,* 640 F.2d 450 (2nd

Cir. 1981); *Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675 (9th Cir. 1984); *Macko v. Byron,* 641 F.2d 447 (6th Cir. 1981); *Atkins v. Lanning,* 556 F.2d 485 (10th Cir. 1977). The Fifth Circuit, in the instant case, has completely stripped state prosecutors of their immunity from damage claims for the performance of their prosecutorial duties. Undoubtedly this decision will have a chilling effect upon future criminal prosecutions in this circuit and others which may substantially undermine the effectiveness of our criminal justice system.

There Is A Conflict Among The Circuits

There is a direct conflict between the Fifth Circuit and the Second, Sixth, Ninth and Tenth Circuits regarding the nature and scope of the prosecutorial immunity doctrine.

In *Taylor v. Kavanagh* the Court of Appeals for the Second Circuit held that a state prosecutor was absolutely immune for alleged misconduct which involved intentional misrepresentation and failure to comply with the terms of a plea bargain agreement under the doctrine of prosecutorial immunity even though the alleged improprieties of the prosecutor were illegal and could not be condoned by the court.

The Ninth Circuit recently held in *Ybarra v. Reno Thunderbird Mobile Home Village, supra,* that a state prosecutor was entitled to absolute prosecutorial immunity even though he was accused of destroying exculpatory evidence in connection with a state criminal prosecution and thereby caused the plaintiff's wrongful conviction and subsequent incarceration.

The Tenth Circuit has also upheld the doctrine of prosecutorial immunity in a fact situation which is substantially similar to the case at bar. In *Atkins v. Lanning, supra,* the court held that a state prosecutor was entitled to absolute immunity where the plaintiff was improperly arrested under a facially valid warrant for the reason that the prosecutor was merely engaged in "preparing and presenting the state's case" and did not personally participate in the plaintiff's arrest.

It is clear, therefore, that a sharp conflict has arisen between the circuits regarding the nature and scope of the prosecutorial immunity doctrine. Accordingly, a writ of certiorari should issue to review the panel decision of the Fifth Circuit to resolve this conflict with all deliberate speed.

The Power Of Supervision Should Be Exercised

As set out above, the panel decision of the Fifth Circuit in the instant case has created a sharp conflict among the circuits regarding the nature and scope of the prosecutorial immunity doctrine. In addition, the court has departed from the customary application of this doctrine by other panels of the Court of Appeals for the Fifth Circuit.

In prior decisions other panels of the Fifth Circuit have held that, even where a prosecutor knowingly used perjured testimony and deliberately withheld exculpatory evidence in a criminal prosecution, his immunity from damages remained intact. *Prince v. Wallace,* 568 F.2d 1176 (5th Cir. 1976). Moreover, the court has held that the filing of a criminal information without investigation, filing charges without jurisdiction and instituting arrest and search proceedings without probable cause were a neces-

sary and integral part of the prosecutors role which were protected under the cloak of the immunity doctrine. *Henzel v. Gerstein,* 608 F.2d 654 (5th Cir. 1978).

In addition to the departure from prior decisions of the Fifth Circuit regarding the doctrine of prosecutorial immunity, the panel decision in the instant case has completely ignored the well-settled state law in Texas which has held that a District Attorney is a state officer and therefore insulated from a claim for damages under the Eleventh Amendment to the United States Constitution. Indeed, one month following the final determination of the instant case, the Fifth Circuit, en banc, held that a District Attorney from Potter County, Texas, was a *state official* empowered under Texas law to enforce the state criminal laws and as such was " . . . a state officer seeking to intervene [and] a proper party to do so." *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985).

It is apparent, therefore, that the power of supervision should be exercised by this Court to correct the inconsistencies created by the panel of the Fifth Circuit in the case at bar.

The Questions Are Substantial

The doctrine of prosecutorial immunity is absolutely essential to the proper functioning of our criminal justice system. It was not created by this Court for the protection of malicious, corrupt or incompetent prosecutors but rather, for the protection of the general public whose interest it is that prosecutors should be at liberty to exercise consequences and make decisions without fear of being hounded with civil litigation by dissatisfied or embittered criminal defendants charging malice or wrongdoing.

The departure of the Fifth Circuit from the customary application of the prosecutorial immunity doctrine in the instant case may cause the erosion of a state prosecutor's immunity in this and other circuits. As a direct result of this decision the effectiveness of our criminal justice system may be substantially impaired because state prosecutors might be unwilling to file criminal charges against a criminal suspect for fear of potential civil liability or the attendant inconveniences of defending a federal lawsuit.

Thus, it is clear that the questions presented herein are substantial and, accordingly, this Court should grant certiorari to correct the panel decision of the Court of Appeals for the Fifth Circuit in the case at bar.

———o———

CONCLUSION

For each and all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit in the case at bar.

Respectfully submitted,

HENRY WADE
Criminal District Attorney
Dallas County, Texas

SUE LAGARDE
Chief Felony Prosecutor
Dallas County, Texas

PETER L. HARLAN
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Dallas County Courthouse
600 Commerce Street
Dallas, TX 75202
(214) 749-8134

Attorneys for Petitioner

APPENDIX

APPENDIX A

Stephen C. CRANE, on Behalf of himself
and others similarly situated,
Plaintiff-Appellee-Cross Appellant,

v.

STATE OF TEXAS,
Defendant-Appellant,

v.

COUNTY OF DALLAS, Ben Ellis, John Orvis,
Mike Schwille, Berlaind Brashear and Chuck
Miller, Defendants-Appellants-Cross Appellees,

v.

Henry WADE and L. E. Murdoch,
Defendants-Appellees.

No. 83-1650

United States Court of Appeals,
Fifth Circuit.

May 2, 1985.

Rehearing and Rehearing En Banc
Denied July 22, 1985.

Plaintiff brought action challenging county's practice of issuing misdemeanor capias without a finding of probable cause. The United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., denied plaintiff's request for injunctive relief, but held that both county and district attorney were immune from liability for damages, awarding plaintiff only attorney fees. On appeal, the Court of Appeals, Gee, Circuit Judge,

held that: (1) county was not immune under the Eleventh Amendment; (2) Texas law requires issuance of a valid capias to be preceded by neutral magistrate's determination of probable cause; (3) county's practice of issuing misdemeanor capias without a finding of probable cause by a neutral and detached magistrate was unconstitutional under the Fourth Amendment; (4) neither county nor district attorney was immune from liability for money damages; and (5) award of attorney fees ran against the county, not the state.

Affirmed in part; reversed in part.

Amended in part, July 22, 1985.

1. Federal Courts — 265

Eleventh Amendment acts as a jurisdictional bar, and therefore an assertion of Eleventh Amendment immunity cannot be ignored, for a meritorious claim to that immunity deprives court of subject-matter jurisdiction of the action. U.S.C.A. Const.Amend. 11.

2. Federal Courts — 270

Claim in civil rights action by county that it was immune under the Eleventh Amendment as an arm or agent of the state put in question trial court's jurisdiction over subject matter of plaintiff's action against county, and thus it was incumbent upon trial court to settle the question before proceeding further. U.S.C.A. Const.Amend. 11.

3. Federal Courts — 270

Eleventh Amendment immunity does not, as a general rule, extend to counties. U.S.C.A. Const.Amend. 11.

4. Federal Courts — 270

Any award against county in civil rights suit challenging county's practice of issuing misdemeanor capias without a finding of probable cause would not be derived from state treasury; therefore, exception allowing county to enjoy Eleventh Amendment immunity for those cases in which relief granted would run directly against the state did not apply, and county was not entitled to Eleventh Amendment protection on that basis. U.S.C.A. Const.Amend. 11.

5. Federal Courts — 270

Texas counties are not excepted as unique from general rule denying Eleventh Amendment immunity to couties. U.S.C.A. Const.Amend. 11.

6. Criminal Law — 217

Texas law requires issuance of a valid misdemeanor capias to be preceded by neutral magistrate's determination of probable cause.

7. Federal Courts — 411

Civil rights suit challenging county's practice of issuing misdemeanor capias without probable cause was brought against county officials and relief sought ran only against county; therefore, district court properly grounded its holding exclusively on state law after declining to reach federal constitutional issue.

8. Criminal Law — 217

Practice by which county issued misdemeanor capias without a finding or probable cause as determined by a

neutral and detached magistrate was unconstitutional under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

9. Federal Courts — 269

State officials partake of the Eleventh Amendment immunity of states they serve. U.S.C.A. Const.Amend. 11.

10. Federal Courts — 269

Claim that state officials violated state law in carrying out their official responsibilities is a claim against the state that is protected by the Eleventh Amendment, even as to a state law claim brought into federal court under pendent jurisdiction. U.S.C.A. Const.Amend. 11.

11. Civil Rights — 13.7

Where ultimate authority for determining county capias procedures reposed in the district attorney, an elected county official, his decisions in that regard constituted official policy attributable to the county; therefore, county was not immune from liability for money damages in civil rights suit challenging capias practice on basis that accused practices were neither done for the county nor subject to its control.

12. Civil Rights — 13.8(6)

Texas statute providing that a district attorney, upon request, will give an opinion or advice in writing to any county or precinct officer of the district or county, touching their official duties, did not render district attorney immune from liaiblity for money damages in civil rights suit challenging county's practice of issuing misdemeanor capias without a finding of probable cause, where district attorney himself established procedures to be followed by

county in issuing misdemeanor capias, and his duty to establish procedures in accordance with United States Constitution and laws of Texas was one entirely independent of any duty to render legal advice to others. Vernon's Ann.Texas Civ.St. art. 334.

13. Civil Rights — 13.17(11)

Under the Civil Rights Attorney's Fees Awards Act, attorney fees are properly assessed against the state when its officials are sued in their official capacities, and when their conduct may fairly be said to represent its official policies. 42 U.S.C.A. § 1988.

14. Civil Rights — 13.17(11)

Where plaintiff challenging county's practice of issuing misdemeanor capias without a finding of probable cause did not sue the individual defendants for actions taken on behalf of the state, but sued them because of roles they played in establishing and implementing county system of issuing misdemeanor capias, and where defendants created that system and controlled it for the county, not for the state, attorney fees under the Civil Rights Attorney's Fees Awards Act ran, not against the state, but against the county, 42 U.S.C.A. § 1988.

Earl Luna, Dallas, Tex., for Ellis et al. and Dallas County.

Jim Mattox, Atty. Gen., Mary F. Keller, Lawrence J. King, Asst. Attys. Gen., Austin, Tex., for the State of Texas.

Peter Lesser, Johnston & Larson, Douglas R. Larson, Dallas, Tex., for Crane.

Sue L. Lagarde, Asst. Dist. Atty., Dallas, Tex., for Henry Wade & Larry Murdoch.

Appeals from the United States District Court for the Northern District of Texas.

Before GEE, WILLIAMS and JOLLY, Circuit Judges.

GEE, Circuit Judge:

On behalf of himself and others similarly situated, Stephen Crane brought an action pursuant to 42 U.S.C. §§ 1983, 1988, and the common law of Texas, against the State of Texas, Dallas County, the judges of the Dallas County Criminal Courts, the Dallas County Clerk, the Dallas County Criminal District Attorney, the City of Dallas, and divers Dallas police officers. The gravamen of his complaint was that Dallas County regularly issued misdemeanor capias without a finding of probable cause by a neutral and detached magistrate in violation of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article 23.04, Tex.Code Crim.Proc. Ann. (Vernon). Alternatively, he alleged that articles 23.01 and 23.04 of the Tex.Code Crim.P. were unconstitutional if they allowed a clerk to issue a capias on nothing more than a District Attorney's information and affidavit. Crane sought declaratory and injunctive relief as well as monetary damages.

In an Order filed April 30, 1981, the trial court certified maintenance of the case as a class action and granted the motion to dismiss of the State of Texas on

the ground of the State's Eleventh Amendment immunity from suit in the federal courts. The trial court also denied the judges' motions to dismiss on the ground that their common law judicial immunity did not extend to § 1983 suits seeking equitable relief.

The legality of the challenged practices was considered separately from Crane's entitlement to damages. In an order filed November 30, 1981, the trial court concluded that under Texas law a determination of probable cause by a neutral magistrate must precede the issuance of a valid misdemeanor capias; the Dallas practice therefore violated Texas law. Defendants were invited to submit proposals for reform of the Dallas County misdemeanor capias system. By February 4, 1982, defendants had done more than submit proposals; they had changed the County system to ensure that misdemeanor capias issued only after the requisite finding of probable cause by a properly neutral magistrate. The trial court therefore denied Crane's request for injunctive relief.

The remaining issues of damages and attorney's fees were tried to a jury. The jury awarded Crane $40,000 in compensatory damages to be paid by the County and the District Attorney. It found that District Attorney Wade, as legal advisor to the County, knew or should have known that the County capias system infringed Crane's established constitutional rights, but that the police, the City of Dallas, and Murdoch, the County Clerk, had acted in good faith and without knowledge of the constitutional infringement.

The court held, in a memorandum opinion filed March 11, 1982, that the County was immune from liability for

damages because the illegal practices were not a "county policy or custom." The District Attorney was immune from liability for damages because he was primarily responsible to the State and breached no duty he owed to the County. Crane thus took nothing. He was, however, awarded attorneys' fees as a "prevailing party" under 42 U.S.C. § 1988. The award was made against the State of Texas because defendants were "wearing their state hats" when they performed the acts complained of. The trial court modified its original order of September 8, 1982; and, in a memorandum opinion filed July 26, 1983, reduced the fees to be awarded Crane. The reduction was based on *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). All parties appeal from those aspects of the trial court's holdings adverse to themselves.

Facts

The facts underlying this action are simple and undisputed. A lawyer with whom Crane shared office space listed Crane, without Crane's knowledge or consent, as an initial director of Crystal Theater, Inc., in the corporation's Articles of Incorporation. The Crystal Theater showed dirty movies in Dallas. Dallas police visited the theater and determined its movies to be obscene. Proceeding solely on the basis of the Articles of Incorporation, and without further investigation, the Dallas police prepared a case report charging Crane with distribution of commercial obscenity, a misdemeanor. The police sent the report to the Dallas County Criminal District Attorney's office. The District Attorney's office decided to prosecute Crane and prepared an information and accompanying affidavit charging him with the misdemeanor of-

fense. The information and affidavit were filed with the Dallas County Clerk's office. The Clerk's office typed Crane's name on a writ of capias form, thereby authorizing Crane's arrest, and gave the form to the police, who duly arrested Crane. He spent about four hours in the Dallas County jail before being released on bail. The charges against him were later dismissed for insufficient evidence at the request of the District Attorney's office, which had belatedly discovered Crane's lack of connection with the theater. This suit followed.

Eleventh Amendment Immunity

[1, 2] Dallas County contended at trial and contends on appeal that its status as a state agency entitled it to Eleventh Amendment[1] immunity from federal suit, and therefore to dismissal for lack of jurisdiction. The trial court found it unnecessary to decide this question, and declined to do so. This was error. Because the Eleventh Amendment acts as a jurisdictional bar, *Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974); *Laje v. R. E. Thomason General Hospital*, 665 F.2d 724, 726 n. 2 (5th Cir.1982), an assertion of Eleventh Amendment immunity cannot be ignored, for a meritorious claim to that immunity deprives the court of subject matter jurisdiction of the action. Dallas County's claim of

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[1]U.S. Const. amend, XI provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Eleventh Amendment has been held since 1890 to bar as well federal suits by citizens against their own states. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Eleventh Amendment immunity as an arm or agent of the State of Texas, *Chiz's Motel v. Mississippi State Tax Com'n,* 750 F.2d 1305, 1307 (5th Cir.1985); *United Carolina Bank v. Board of Regents,* 665 F.2d 553, 557 (5th Cir. 1982), thus put in question the trial court's jurisdiction over the subject matter of Crane's action against the County; it was incumbent upon the trial court to settle the question before proceeding further. The error was harmless, however, in view of our conclusion that the immunity to federal suit granted by the Eleventh Amendment to the State of Texas does not extend to Dallas County.

The Supreme Court has "held that the Eleventh Amendment does not apply to 'counties and similar municipal corporations.'" *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, — n, 34, 104 S.Ct. 900, 920 n. 34, 79 L.Ed.2d 67, 93 n. 34 (1984), *quoting Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977). In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), the Supreme Court stated that it "has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" 440 U.S. at 401, 99 S.Ct. at 1177, citing in support *Mt. Healthy; Moor v. County of Alameda,* 411 U.S. 693, 717-721, 93 S.Ct. 1785, 1799-1802, 36 L.Ed.2d 596 (1973), and *Lincoln County v. Luning,* 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890). The *Lincoln* Court explicitly rejected a county's assertion of Eleventh Amendment immunity:

> [I]t may be observed that the records of this court for the last thirty years are full of suits against

> counties, and it would seem as though by general consent the jurisdiction of the federal courts in such suits had become established. But irrespective of this general acquiescence, the jurisdiction of the circuit courts is beyond question. The Eleventh Amendment limits the jurisdiction only as to suits against a State.

133 U.S. at 530, 10 S.Ct. at 363. Although the *Lincoln* Court acknowledged the Eleventh Amendment as a bar to suits "in which the State is a real, if not a nominal, defendant," it did not place suits against counties in this category:

> [W]hile the county is territorially a part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State. In respect it is a part of the State only in that remote sense in which any city, town or other municipal corporation may be said to be a part of the State.

Id, see also Mercer County v. Cowles, 74 U.S. (7 Wall) 118, 122, 19 L.Ed. 86 (1868). Given such unambiguous pronouncements by the Supreme Court, repeated over so long a period of time, it is scarcely surprising that other courts have considered as settled the Eleventh Amendment's lack of applicability to counties.[2] *See, e.g., Tuveson v. Florida Governor's Council on Indian Affairs, Inc.,* 734 F.2d 730, 732 (11th Cir.1984) ("Eleventh Amendment immunity does not extend to independent political entities, such as counties"); *Hall v. Medical College of Ohio,* 742 F.2d 299, 301 (6th Cir.1984) ("Municipalities, counties and

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[2]Commentators consider it settled as well. Professor Wright, for example, flatly states that "[t]he Eleventh Amendment does not provide immunity for counties and similar municipal counties." Wright, *Federal Courts* § 46, at 274 (1983); *see also* 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.60 [2————2] (2d ed. 1984).

other political subdivisions (e.g., public school districts) do not partake of the state's Eleventh Amendment immunity"); *Fouche v. Jekyll Island-State Park Authority,* 713 F.2d 1518, 1520 (11th Cir.1983) ("Eleventh Amendment immunity to suit in federal court applies to states and state officials but not to municipal corporations, counties, or other political subdivisions of the state."); *Morris v. Washington Metropolitan Area Transit Authority,* 583 F.Supp. 1522, 1524 (D.D.C.1984) (political subdivisions such as municipalities and counties not entitled to invoke Eleventh Amendment immunity); *Kenny v. Board of Trustees,* 563 F.Supp. 95, 98 (D.Montana 1983) ("immunity provided the states by the Eleventh Amendment does not extend to counties"); *Calkins v. Blum,* 511 F.Supp. 1073, 1099 (N.D.N.Y.1981), *aff'd,* 675, F.2d 44 (2d Cir.1982) (Eleventh Amendment no bar to suit for damages against county commissioners); *Woods v. Homes and Structures of Pittsburg, Kansas, Inc.* 489 F.Supp. 1270, 1295-96 (D.Kansas 1980) ("bar of the Eleventh Amendment does not extend to counties"); *Highfield Water Co. v. Public Service Commission,* 488 F.Supp. 1176, 1194 (D.Md.1980) (same); *Patterson v. Ramsey,* 413 F.Supp. 523, 529 (D.Md.1976), *aff'd,* 552 F.2d 117 (4th Cir.1977) (same).

There is a similar abundance of authority holding the Eleventh Amendment inapplicable to counties of particular states. *See, e.g., Heiar v. Crawford County,* 746 F.2d 1190, 1194 (7th Cir.1984) (Wisconsin county); *Scott v. Greenville County,* 716 F.2d 1409, 1422 (4th Cir.1983) (South Carolina county); *Holley v. Lavine,* 605 F.2d 638, 642-45 (2d Cir.1979), *cert. denied,* 446 U.S. 913, 100 S.Ct. 1843, 64 L.Ed.2d 266 (1980) (New York county); *Lenoir*

v. Porters Creek Watershed District, 586 F.2d 1081, 1088-89 (6th Cir.1978) (Tennessee and Mississippi counties); *Mackey v. Stanton,* 586 F.2d 1126, 1130-31 (7th Cir.1978), *cert. denied,* 444 U.S. 882, 100 S.Ct. 172, 62 L.Ed.2d 112 (1979) (Indiana county); *Brown v. Marshall County,* 394 F.2d 498, 500 (6th Cir.1968) (Kentucky county); *Federal Land Bank v. County Commissioners,* 582 F.Supp. 1507, 1512 (D.Colorado 1984) (Colorado county); *Allsup v. Knox,* 508 F.Supp. 57, 61 (E.D.Ky,1980) (Kentucky county); *Jones v. Houser,* 489 F.Supp. 795, 798 (E.D.Missouri 1980) (Missouri county); *Obenshain v. Halliday,* 504 F.Supp. 946, 952 (E.D.Va.1980) (Virginia county); *Knight v. Carlson,* 478 F.Supp. 55, 56-57 (E.D.Cal.1979) (California counties); *Rafferty v. Prince George's County,* 423 F.Supp. 1045, 1058 n. 9 (D.Md.1976) (Maryland county).

Acceptance of the general rule excluding counties from Eleventh Amendment immunity is implicit in a number of other decisions. *See e.g., Campbell v. Pierce County,* 741 F.2d 1342 (11th Cir.1984); *Travelers Indemnity Co. v. School Board of Dade County,* 666 F.2d 505, 509 (11th Cir.), *cert. denied,* 459 U.S. 834, 103 S.Ct. 77, 74 L.Ed.2d 74 (1982); *Logan v. Shealy,* 660 F.2d 1007, 1015 (4th Cir.1981), *cert. denied,* 445 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982); *Ledford v. Delancey,* 612 F.2d 883, 887 (4th Cir.1980). We have recognized this general rule in a recent case. Called upon to determine whether the Eleventh Amendment barred a suit against the Mental Health and Mental Retardation Authority of Harris County, Texas, we held that it did not, because "the record before us indicates MHMRA is more like a county or city than an arm of the state." *Wheeler v. Mental Health and*

Mental Retardation Authority, 752 F.2d 1063, 1072-73 (5th Cir. 1985).[3] District courts in our Circuit have applied the general rule to Texas counties. *See, e.g., Johnston v. Shaw,* 556 F.Supp 406, 409 (N.D.Tex.1982) (citing, among other cases, *Mt. Healthy, Lincoln, and Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 233, 84 S.Ct. 1226, 1234, 12 L.Ed.2d 256 (1964)); *Wells v. Hutchinson,* 499 F.Supp. 174, 204 n. 40 (E.D.Tex.1980); *Adams v. Harris County,* 316 F.Supp. 938, 944 (S.D.Tex.1970), *rev'd on other grounds,* 452 F.2d 994 (5th Cir.1971), *cert. denied,* 406 U.S. 968, 92 S.Ct. 2414, 32 L.Ed.2d 667 (1972) (citing, among other authorities, *Lincoln and Wright, supra* n. 2).

[3] We think the authorities cited above establish without question that Eleventh Amendment immunity does not, as a general rule, extend to counties. We are further persuaded that no exception should be made to this rule without convincing evidence distinguishing the county in

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[3] *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir.1980), is consistent with the general rule we state here. In that case, we held the Hondo Independent School District liable and Medina County not liable for damages under § 1983 because the policy at issue could be attributed to the former but not to the latter. We then continued,

> Though logic would seem, then, to impel a finding of liability against the State—since the statute obviously represents the official policy of the State—*the State enjoys immunities not shared by its two political subdivisions.* In addition to a state's traditional sovereign immunity, the Eleventh Amendment and its judicial gloss also prohibit private actions for damages against state in federal court.

619 F.2d at 404 (emphasis added) (footnotes omitted). The clear import of this language is that the State's Eleventh Amendment immunity extends neither to the School District nor to the County.

question from counties generally. Dallas County has produced no such evidence.[4]

[4] The Supreme Court has recognized an exception to the general rule denying Eleventh Amendment immunity to counties for those cases in which the relief granted would run directly against the state. *Pennhurst*, 465 U.S. at — n. 34, 104 S.Ct. at 920 n. 34, 79 L.Ed.2d at 93 n. 34; *compare Lake County Estates*, 440 U.S. at 401, 99 S.Ct. at 1177 (exception applies to state agencies, not to counties); *see also Wheeler*, 752 F.2d at 1073 (agency would be immune "if payment of the judgment were to be made *directly* from the state treasury") (emphasis added). We therefore agree with Dallas County that the most crucial factor to be considered in determining the County status is "whether the funds to defray any award would be derived from the state treasury." *Laje*, 665 F.2d at 727. The County argues that it falls within this exception to the

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[4]The County's reliance on *Doe v. Sullivan*, 472 F.Supp. 975 (W.D.Tex.1979), is misplaced. The *Doe* court held El Paso County immune under the Eleventh Amendment on the sole basis of Texas state cases, the most recent decided in 1937, describing Texas counties as arms of the state. This was error. Although a federal court dealing with a federal right is not required to ignore state law; "(m)unicipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law." *Owen v. City of Independence*, 455 U.S. 622, 647 n. 30, 100 S.Ct. 1398, 1413 n. 30, 63 L.Ed.2d 673 (1980), *citing Fitzpatrick v. Bitzer*, 427 U.S. 455, 455-56, 96 S.Ct. 2666, 2671-72, 49 L.Ed.2d 614 (1976); *see also Monell v. New York City Department of Social Services*, 436 U.S. 658, 695 n. 59, 98 S.Ct. 2018, 2038 n. 59, 56 L.Ed. 2d 611 (1978) (it has never been the law that state law immunities override § 1983 causes of action). Because *Doe* failed utterly to include in its analysis the applicable federal cases, most conspicuously, for reasons discussed above, *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), and *Avery v. Midland County, Texas*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), we explicitly overrule it.

rule because Texas law "declares *all* property in the hands of counties to belong to the state itself, *Robbins v. Limestone* County, 114 Tex. 345, 268 S.W. 915 (1925), and *Baker v. Dunning,* 77 Tex. 28, 13 S.W. 617, 618 (1890) ("counties . . . hold their property, as they hold their existence, at the will of the state . . . and . . . it is subject to be resumed by the state at its pleasure"). We are not persuaded.

First, the County has not shown that a different relationship obtains between other states and their counties. Second, the County's proposition is unsupported by either Texas statutes or the Texas Constitution; the cases cited support the proposition only insofar as the county holds the property at issue as an agent of the state. It is clear, from Dallas County's own authorities, that not all county property is so held. The Texas Supreme Court stated in *Baker* that "[i]n *Milam Co. v. Bateman,* 54 Tex. 153, it was held that the state could not take from the counties the lands which had been donated to them for educational purposes. We are of the opinion that that decision should be adhered to." 13 S.W. at 618. There is language in *Robbins* to similar effect: "If the title and ownership of the public roads reposes in the counties under the Constitution, and if they are property of the counties, then they would have the right to control them, and certainly the state, or any other power, would have no right to take them in any manner, except and unless compensation should be made therefor." 268 S.W. at 918. Nothing in either of these cases, or in any of the other authorities cited by the County, suggests that the State may seize at will funds raised by the County through properly authorized taxation, bond issues, or sale of property.

Third, the position taken by Dallas County here is patently inconsistent with its position in *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir.1981), *cert. denied*, 456 U.S. 925, 102 S.Ct. 1969, 72 L.Ed.2d 440 (1982). The County moved to intervene in *Barrett*[5] on the ground that "an adjudication of Thomas's liability in its absence would impair its interest in protecting the County treasury against the plaintiffs' claims." 649 F.2d at 1197. The County now suggests that its treasury belongs to the state, and effectively disavows any interest in it. We find this abrupt volteface unconvincing; it is unlikely in the extreme that the County made the significant expenditures of time and money required by its multiple appeals in *Barrett* in order to protect the state's property.[6] Dallas County's contention is further refuted by our conclusion in *Barrett* that "[t]he district court has ample authority to bind Dallas County by its order to require payment *from County funds*." 649 F.2d at 1206 (emphasis added). Our belief

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[5]When the trial court denied the motion, the County considered the matter sufficiently important to pursue an interlocutory appeal to this Court, which affirmed the denial, and then to petition the Supreme Court for a writ of certiorari, which the Court denied. *Weber v. Barrett*, 450 U.S. 1022, 101 S.Ct. 1729, 68 L.Ed.2d 218 (1981). The County did not, apparently, believe that the Eleventh Amendment presented a bar to its participation in *Barrett* as a party defendant.

[6]*City of Waco v. Bridges*, 710 F.2d 220 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1414, 79 L.Ed.2d 741 (1984), is also persuasive authority against the County's position. In that case, McLennan County intervened to assert a claim to money found by two boys. The IRS and the State of Texas also claimed the money. The trial court first rejected the IRS claim, and then held that "as between the State and the County, the money was payable to the County," 710 F.2d at 224; we affirmed the trial court's holding. *Waco* makes no sense whatsoever if Texas counties can have no property of their own distinct from that of the State.

in the character of such funds is unshaken by the arguments made here by the County. We therefore find that an award against Dallas County is not an impermissible award against the state, and that the funds to defray such an award would not be derived from the state treasury.[7] Dallas County's attempt to bring itself within the "state treasury" exception to the general rule against extending Eleventh Amendment protection to counties must therefore fail.

[5] Dallas County also asserts entitlement to Eleventh Amendment immunity on another ground. The County claims that Texas counties are unique and ought therefore to be excepted from the general rule denying Eleventh Amendment immunity to counties. In support of this assertion, the County offers a number of quotations from Texas state cases of decidedly antique vintage,[8] of which this language from *Bexar County v. Linden*, 110 Tex. 339, 220 S.W. 761 (1920), is typical:

> [Counties] are essentially instrumentalities of the State. They are the means whereby the powers of the

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[7]We note that our finding accords with the position taken in this litigation by the State of Texas which, while not conclusive, is certainly entitled to some weight. *See Moor*, 411 U.S. at 720-21, 93 S.Ct. at 1801-02. The State maintained that Texas counties are fiscally autonomous, noting that under the Texas Constitution and Texas statute counties "raise revenues through the issuance of bonds, the purchase and sale of property, fees for services, the collection of taxes and fines levied," keep such revenues in the county treasury, and disperse them at the direction of the county commissioners court.

[8]Including, among others, *Childress County v. State*, 127 Tex. 343, 92 S.W.2d 1011 (1936); *Heigel v. Wichita County*, 84 Tex. 392, 19 S.W. 562 (1892); *City of Galveston v. Posnainsky*, 62 Tex. 118 (1886); and *Chambers v. Gilbert*, 17 Tex.Civ.App. 106, 42 S.W. 630 (Tex.Civ.App.—1897, writ ref'd).

> State are exerted through a form and agency of local government for the performance of those obligations which the State owes the people at large. They are created by the sovereign will without any special regard to the will of those who reside within their limits. Their chief purpose is to make effective the civil administration of the State government. The policy which they execute is the general policy of the State. Through them the powers of government operate upon the people and are controlled by the people. They are made use of by the State for the collection of taxes, for the diffusion of education, for the construction and maintenance of public highways, and for the care of the poor. All of these things are matters of state, as distinguished from municipal, concern. They intimately affect all the people. The counties are availed of as efficient and convenient means for the discharge of the State's duty in their regard to all the people.

220 S.W. at 762.

As evidence of the uniqueness of Texas counties, *Bexar* is singularly unconvincing. There is nothing in the passage quoted above, or in any of the authorities cited by Dallas County, to distinguish Texas counties from counties generally, which were described by the Supreme Court in *Reynolds v. Sims* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), as follows:

> Political subdivisions of States — counties, cities, or whatever — never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, 52 L.Ed. 151, 159, 28 S.Ct. 40 [46], these governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and

> the "number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State." The relationship of the States to the Federal Government could hardly be less analogous.

377 U.S. at 575, 84 S.Ct. at 1388. Moreover, in vacating the judgment of the Texas Supreme Court in *Avery v. Midland County,* 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), the Supreme Court implicitly rejected the claim of uniqueness made here by Dallas County:

> The Texas commissioners courts are assigned some tasks which would normally be thought of as "legislative," others typically assigned to "executive" or "administrative" departments, and still others which are "judicial." In this regard *Midland County's Commissioners Court is representative of most of the general governing bodies of American cities, counties, towns, and villages.* One knowledgeable commentator has written of "the states' varied, pragmatic approach in establishing governments." R. Wood, in Politics and Government in the United States 891-892 (A. Westin ed. 1965). That approach has produced a staggering number of governmental units — the preliminary calculation by the Bureau of the Census for 1967 is that there are 81,304 "units of government" in the United States—and an even more staggering diversity. Nonetheless, while special-purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs. *In many cases citizens reside within and are subject to two such governments, a city and a county. The Midland County Commissioners Court is such a unit.*

390 U.S. at 482-83, 88 S.Ct. at 1119-20 (emphasis added) (footnotes omitted). Further, the attributes of Texas counties, as enumerated in *Avery*, 390 U.S. at 483-84, 88 S.Ct. at 1119-20, and as provided by Texas law, are virtually indistinguishable from those of California counties, as described in *Moors*

> Most notably, under California law a county is given "corporate powers" and is designated a "body corporate and politic." In this capacity, a county may sue and be sued, and, significantly for purposes of suit, it is deemed to be a "local public entity" in contrast to the State and state agencies. In addition, the county, and from all that appears the county alone, is liable for all judgments against it and is authorized to levy taxes to pay such judgments. A California county may also sell, hold, or otherwise deal in property, and it may contract for the construction and repairs of structures. The counties also are authorized to provide a variety of public services such as water service, flood control, rubbish disposal, and harbor and airport facilities. Financially, the counties are empowered to issue general obligation bonds payable from county taxes.

411 U.S. at 719-20, 93 S.Ct. at 1800-01 (footnotes omitted). It does not appear that Texas counties lack even one of these attributes.[9] Thus, because Texas counties are not

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[9]Texas counties are bodies corporate and public. Tex.Rev. Civ.Stat.Ann. art. 1572 (Vernon 1962). They may sue and be sued, arts. 1573, 1579; *O'Quinn v. McVicker*, 428 S.W.2d 111, 112 (Tex.Civ.App.—Beaumont 1968, no writ). Texas counties agencies, Tex.Const. art. XI, §§ 1, 3; Tex.Rev.Civ.Stat.Ann. arts. are considered units of local government rather than state 4413 (32b); 6252-18a(b)(2); 6252-19, § 2(1). They are liable for judgments against them and may levy taxes to pay such judgments, arts. 1575, 6252-19, § 11; *County of Brazoria v. Radtke*,

(Continued on following page)

unique, but instead share all the characteristics of California counties and, under *Reynolds*, of counties generally, we conclude, as did the Supreme Court in *Moor*, that Texas counties are not mere arms or agents of the state; they are independent units of local government to which the immunity granted by the Eleventh Amendment does not apply. We therefore reject the claim of Dallas County to such immunity and hold it subject to suit in federal court.[10]

This holding necessarily disposes of Dallas County's contention that it is not a "person" within the meaning of 42 U.S.C. § 1983; under *Monell v. New York City Depart-*

(Continued from previous page)

566 S.W.2d 326, 328 (Civ.App.—Beaumont 1978, writ ref'd n.r.e.). Texas counties may buy, sell, hold, or otherwise deal in property, arts. 1576, 1577, and may enter into contracts, art. 1578, including contracts for the construction and repair of structures, art. 2307b; *County Commissioners Court* v. *Williams*, 638 S.W.2d 218, 222-23 (Tex.App.—Eastland 1982), *writ ref'd n.r.e. per curiam*, 655 S.W.2d 206 (Tex.1983). They may issue bonds, arts. 1644c-1, 1666a(c); *Avery*, 390 U.S. at 483, 88 S.Ct. at 1119, and provide a variety of public services, including airports, art. 1581d; flood control, art. 1581e; libraries, art. 1696b; and parks, art. 6081; *see Avery*, 390 U.S. at 484, 88 S.Ct. at 1120.

[10]Our holding is not inconsistent with *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir.1981) (en banc). In that case, we pretermitted the issue of Texas county entitlement to Eleventh Amendment immunity. On remand, the district court determined that the Eleventh Amendment did not confer immunity on Harris County, 584 F.Supp. 897, 898 (S.D.Tex.1984). It reached this determination by applying to the County the principles established by this Court in *Laje*, 665 F.2d at 727. We are persuaded by our review of the relevant case law and authorities that the general rule denying Eleventh Amendment immunity to counties and other municipal corporations is sufficiently well established to render application of the *Laje* criteria unnecessary with regard to such units of local government, absent convincing evidence indicating that the entity in question is indeed atypical, or that the "state treasury" exception to the general rule may apply.

ment of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a unit of local government not protected by the Eleventh Amendment is such a person. 436 U.S. at 690 and n. 54, 98 S.Ct. at 2035 and n. 54.[11]

The Dallas County System

[6] Dallas County and its judges also assign as error the trial court's holding, in its Memorandum Order of November 30, 1981, that Texas law requires issuance of a valid capias to be preceded by a neutral magistrate's determination of probable cause. Because Texas courts have the final authority to interpret Texas legislation, *Brown v. Ohio,* 432 U.S. 161, 167, 97 S.Ct. 2221, 2226, 53 L.Ed.2d

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[11]The defendant judges of the Dallas County Criminal Courts joined with Dallas County in claiming entitlement to Eleventh Amendment immunity. Insofar as they sought to derive such immunity from the County, their claim must plainly fail with that of the County. *Monell,* 436 U.S. at 690 n. 55, 98 S.Ct. at 2035 n. 55. The judges also contend that they are not "persons" under § 1983. The Supreme Court's recent decision in *Pulliam v. Allen,* — U.S. —, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984), settles this question. In *Pulliam,* an action brought under § 1983, the Court held that judicial immunity bars neither prospective injunctive relief nor the award of attorneys' fees under § 1988. That state judges are "persons" for § 1983 purposes is clearly implicit in this holding. Further, our own cases establish that state court judges are not immune from federal suits seeking equitable or declaratory relief. *Ciudadanos Unidos de San Juan v. Midalgo County Grand Jury Commissioners,* 622 F.2d 807, 813 n. 16 (5th Cir.1980), *cert. denied,* 450 U.S. 964, 101 S.Ct. 1479, 67 L.Ed.2d 613 (1981) (§ 1983 action against state judges); *Sparks v. Duval County Ranch Co., Inc.,* 604 F.2d 976, 980-81 (5th Cir. 1979) (en banc), *aff'd sub nom Dennis v. Sparks,* 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

In any event, the ground of the judges' appeal is by no means clear. They have been assessed neither with damages nor with attorneys' fees; no declaratory or injunctive relief has been granted against them. We are thus at a loss as to what the judges are appealing *from.*

187 (1977); *Birmingham Fire Insurance Co. v. Winegardner and Hammons, Inc.*, 714 F.2d 548, 550 (5th Cir.1983), we must look to the decisions of Texas courts in our review of this holding; "the latest and most authoritative expression of state law applicable to the facts of the case is controlling." *Brumley Estate v. Iowa Beef Processors, Inc.*, 715 F.2d 996, 997 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1288, 79 L.Ed.2d 690 (1984). There is little difficulty in applying these principles here, for in *Sharp v. State*, 677 S.W.2d 513 (Tex.Crim.App.1984), the Texas Court of Criminal Appeals, sitting en banc, explicitly approved the trial court's interpretation of the Texas statutory scheme for issuing capias. In its opinion, the Texas court quoted extensively from the *Crane* court's November Order:

> In *Crane*, Judge Higginbotham addressed the requirement for a probable cause determination prior to the issuance of a misdemeanor capias under Texas, read in its proper matrix of common law and constitutional standards.

Although recognizing that the Texas statutory scheme authorizing capias does not by its express terms require a probable cause determination:

> "Article 23.04 of the Texas Criminal Code provides that '[i]n misdemeanor cases the capias or summons shall issue from a *court* having jurisdiction of the case.' At the same time, Article 23.03 provides that 'A capias shall be immediately issued by the *district clerk* upon each indictment for *felony* presented. . . .' (emphasis supplied). As will be seen, this difference between 23.03 and 23.04 makes sense when read against the common law rules, and the Texas rules, of arrests for misdemeanors and felonies and explains Article 23.01 which defines capias . . . 'as a writ issued by the

> court or clerk, and directed to any peace officer of the State of Texas, commanding him to arrest a person accused of an offense and bring him before that court immediately. . . .' The explanation is that the scheme presupposes an awareness that valid capias can issue only upon properly determined probable cause. In the case of a felony that determination is made by the grand jury in its decision to indict and it may be issued by the court clerk. With a misdemeanor capias issues not from a County Clerk but from a *court* with jurisdiction over the case. I conclude then that Texas law requires that to be valid a misdemeanor capias must be issued from a court with jurisdiction over the case after a determination by a neutral magistrate of probable cause." *Id.* at page 5.

Judge Higginbotham's conclusion is inescapably correct, and we adopt it as our own. To do otherwise would render the statutory scheme unconstitutional.

677 S.W.2d at 517-18 (emphasis in original). This language is clearly dispositive of the County's contention; the trial court did not err in its reading of Texas law.

[7] The County and its judges next argue that the capias procedures used in Dallas County to arrest people were not unconstitutional. It is not clear that this point is properly before this Court. In accordance with the general rule, established in *Siler v. Louisville & Nashville Railroad Co.*, 213 U.S. 175, 192-93, 29 S.Ct. 451, 455-56, 53 L.Ed. 753 (1909), that "a federal court should decide a case on state-law grounds where possible to avoid a federal constitutional question," *Pennhurst,* 465 U.S. at —, n. 28, 104 S.Ct. at 918 n. 28, 79 L.Ed.2d at 90 n. 28, the trial court declined to reach the constitutional issue in this case and grounded its holding exclusively on state law. This was not necessarily error under *Pennhurst.* That case explicit-

ly affirmed "the desirability of applying the *Siler* principle in cases where the federal court has jurisdiction to decide the state-law issues." *Id. Pennhurst* deprives a federal court of such jurisdiction, and displaces the *Siler* rule, in only those instances where the claim is against state officials to whom the *Exparte Young*[12] exception to Eleventh Amendment immunity would otherwise apply, and in which the relief granted would run against the state:

> [A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when — as here — the relief sought and ordered has an impact directly on the State itself.

Pennhurst, 465 U.S. at —, 104 S.Ct. at 917, 79 L.Ed.2d at 89. Crane's action is not governed by *Pennhurst* because, as discussed below, it was brought against County officials, and because the relief sought ran only against the County.

The manner in which the Supreme Court dealt with the defendant county officials in *Pennhurst* supports this conclusion. Relief was denied against these defendants not because they were protected by the Eleventh Amendment,[13] but rather because "any relief granted against the county officials on the basis of the state statute would be partial and incomplete at best." 465 U.S. at —, 104 S.Ct. at 921, 79 L.Ed.2d at 94. The relief sought in *Crane* presented no such problems. We therefore hold that *Pennhurst* did not divest the trial court of jurisdiction to determine whether

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[12]209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[13]A fair reading of the Court's discussion of this point, and one consistent with *Mt. Healthy* and *Lake Tahoe*, suggests that the county defendants would have been entitled to Eleventh Amendment immunity only if such immunity were required to protect the state treasury. *Pennhurst*, 465 U.S. at — n. 34, 104 S.Ct. at 920-921 n. 34, 79 L.Ed.2d at 93-94 n. 34.

the challenged Dallas County procedures violated Texas law, and affirm the trial court's conclusion that they did so.

This holding does not, however, allow us to ignore the constitutional question presented. Although the matter is far from clear, it appears that the damages awarded Crane by the jury were § 1983 damages, rather than damages stemming from Crane's pendant state law claims. We infer this from the trial court's statement that "[o]n March 11, 1982, the Court held that Dallas County was not liable for § 1983 damages because the accused practices were implemented by officers wearing their state badges and thus did not constitute official County policy under *Monell v. Department of Social Services*, 436 U.S. [658] 568 [98 S.Ct. 2018, 56 L.Ed.2d 611] (1978)." Memorandum Order of July 26, 1983 at 2. Inasmuch as *Monell* has no conceivable application to state law causes of action, and thus could not constitute a bar to recovery of damages arising under state law, it must follow that the injury for which the jury awarded Crane damages was one cognizable under § 1983. It is axiomatic that § 1983 damages can derive only from deprivations of rights secured by the Constitution or laws of the United States. A finding that the Dallas County procedures deprived Crane of such rights was therefore a prerequisite to an award to him of damages under § 1983.

Although the trial court made no such finding explicitly, the required finding may be implicit in the trial court's Order of November 30, 1981:

> The Fourth Amendment provides that "no warrant shall issue except on probable cause." As part of this guarantee a warrant for arrest is to be issued only after a detached and neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443, 444-53 [91 S.Ct. 2022,

> 2026-31, 29 L.Ed.2d 564] (1971), determines that there is probable cause to issue it. *Aquilar v. Texas,* 378 U.S. 108 [84 S.Ct. 1509, 12 L.Ed.2d 723] (1964); *Giordenello v. U.S.,* 357 U.S. 480 [78 S.Ct. 1245, 2 L.Ed.2d 1503] (1958).
>
> The procedure which Dallas County has followed in issuing misdemeanor capias would not meet this requirement if the state statutes were read as permitting a capias to issue without determining probable cause. Specifically, this requirement of probable cause is not met when, as is the case in Dallas County, an assistant clerk in the Criminal Processing Section of the County Clerk's office transfers (types) the information from an affidavit provided by the District Attorney to a document (capias) authorizing an arrest and signs that document in her name or the name of another clerk.

Memorandum Order of November 30, 1981 at 6 (footnote omitted).

That the trial court found the Dallas County practices to deprive Crane of federally guaranteed rights seems also to be implicit in the special interrogatories submitted to the jury. Two of these interrogatories asked the jury to determine whether the County Clerk and the County Criminal District Attorney, in their respective official capacities, "knew, or should have known, that the procedure followed in the issuing of capias infringed a clearly established constitutional right of Stephen Crane."

These questions, and the award of § 1983 damages to Crane, plainly pre-suppose a finding by the trial court that the challenged practices were in fact unconstitutional. Despite the absence of an explicit finding to that effect, we are persuaded that one may be inferred from the trial court's Memorandum Order of November 30, 1981; given

the trial court's admirable analysis of the constitutional issue in that Order, no remand is necessary. *See Gulf Towing Company, Inc. v. Steam Tanker, Amoco New York,* 648 F.2d 242, 245 (5th Cir.1981) (remand not required if complete understanding of issues is possible and there is sufficient basis for appelate court's consideration of merits). We will therefore consider the County's contention that the Dallas County procedures passed constitutional muster.

This contention is grounded on *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The County construes *Gerstein* to permit arrests without prior judicial determinations of probable cause, so long as such determinations are made before extended restraints of liberty after arrest. Because the Dallas County procedures provided, at least in theory, for post-arrest judicial determinations of probable cause, the County argues that they satisfied the constitutional requirements established in *Gerstein.* We disagree. The petitioners in *Gerstein* were arrested without warrants on felony charges. *Gerstein,* 420 U.S. at 116-17 and n. 18, 95 S.Ct. at 864-65 and n. 18. Thus, as the trial court correctly noted, "[i]mplicit in the Court's analysis in *Gerstein* is the premise that review by a neutral magistrate of any probable cause to arrest for a felony committed outside an arresting officer's presence need not precede the arrest. *Gerstein* thus accepts the validity of a warrantless arrest upon probable cause for a felony and addresses the adequacy of its post-arrest review." Memorandum Order of November 30, 1981, at 12. In so doing, the *Gerstein* Court was scarcely breaking new ground; it has been established for centuries that felony arrests may be made without warrants upon probable cause. It is equal-

ly well established that the rule is otherwise for misdemeanor arrests. The Supreme Court explained the distinction in *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925):

> The usual rule is a police officer may arrest without warrant one believed by the officer, upon reasonable cause, to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence. *Kurtz v. Moffitt,* 115 U.S. 487, 29 L.Ed. 458, 6 Sup.Ct. Rep. 148; *Bad Elk v. United States,* 177 U.S. 529, 44 L.Ed. 874, 20 Sup. Ct. Rep. 729. The rule is sometimes expressed as follows:
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> "In cases of misdemeanor, a peace officer, like a private person, has at common law no power of arresting without a warrant except when a breach of the peace is about to be committed or renewed in his presreasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." 9 Laws of England (Halsbury), part III.612.
>
> The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace (1 Stephen, History of Criminal Law, 193), while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant. *Rohan v. Sawin,* 5 Cush. [Mass]. 281.

267 U.S. at 156-57, 45 S.Ct. at 286-87. The law has not changed since *Carroll;* its statement of the "usual rule" was quoted with approval by the Supreme Court in *United States v. Watson,* 423 U.S. 411, 417, 96 S.Ct. 820, 824, 46 L.Ed.2d 598 (1976). The context in which this quotation appeared is relevant here. It was preceded by the statement that "there is nothing in the Court's prior cases

indicating that under the Fourth Amendment a warrant is required to make a valid arrest *for a felony.*" 423 U.S. at 416-17, 96 S.Ct. at 824-25 (emphasis added). It was followed by a review of the Court's decisions involving warrantless felony arrests, including *Gerstein,* 423 U.S. at 417-18, 96 S.Ct. at 825-26. The *Watson* Court then enunciated the principle governing these decisions:

> The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest. 10 Halsbury's Laws of England 344-345 (3d ed 1955); 4 W. Blackstone, Commentaries * 292; 1 J. Stephen, A History of the Criminal Law of England 193 (1883); 2 M. Hale, Plea of the Crown *72-74; Wilgus, Arrest Without a Warrant, 22 Mich L Rev, 547-550, 686-688 (1924); *Samuel v. Payne,* 1 Dougl 359, 99 Eng Rep 230 (KB 1780); *Beckwith v. Philby,* 6 Barn & Cress 635, 108 Eng Rep 585 (KB 1827). This has also been the prevailing rule under state constitutions and statutes. "The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been generally held by the courts of the several States to be in force in cases of felony punishable by the civil tribunals." *Kurtz v. Moffitt,* 115 US 487, 504, 29 Ed 458, 6 SCt 148 [154] (1885).

423 U.S. at 418-19, 96 S.Ct. at 825-26. After a review of state cases following the same principal, the Court concluded,

> The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact. It appears in almost all of the States in the form of express statutory authorization. In 1963, the Ameri-

> can Law Institute undertook the task of formulating a model statute governing police powers and practice in criminal law enforcement and related aspects of pretrial procedure. In 1975, after years of discussion, A Model Code of Prearraignment Procedure was proposed. Among its provisions was § 120.1 which authorizes an officer to take a person into custody if the officer has reasonable cause to believe that the person to be arrested has committed a felony, or has committed a misdemeanor or petty misdemeanor in his presence. The commentary to this section said: "The Code thus adopts the traditional and almost universal standard for arrest without a warrant."
>
> This is the rule Congress has long directed its principal law enforcement officers to follow.

423 U.S. at 421-23, 96 S.Ct. at 826-28 (footnotes omitted).

Watson thus places *Gerstein* squarely amongst cases decided on the basis of the general rule permitting warrantless felony arrests upon probable cause. Given the validity of such arrests, it follows inescapably that judicial determinations of probable cause may follow, rather than precede, them. Nothing compels a similar conclusion as to misdemeanor arrests. The general rule requires that they be made upon warrants, unless the officer has witnessed the offense; the warrant requirement is meaningless absent a judicial determination of probable cause. The Supreme Court has recognized this truth on many occasions. In *McDonald v. United States,* 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), the Court stated,

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, *the Fourth Amendment has interposed a magistrate between the citizen and the police.* This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done

> so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

335 U.S. at 455-56, 69 S.Ct. at 193-94 (emphasis added). *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967), is to similar effect:

> "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes." *United States v. Jeffers,* 342 U.S. 48, 51, 96 L.Ed. 59, 64, 72 S.Ct. 93 [95], and that searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

389 U.S. at 357, 88 S.Ct. at 514 (footnote omitted). The same point is clearly stated in *Shadwick v. City of Tampa,* 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972):

> The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime.

407 U.S. at 350, 92 S.Ct. at 2122. *United States v. United States District Court,* 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed. 2d 752 (1972), is particularly relevant here, for in that case the Court rejected the government's argument that after-the-fact judicial review could be substituted for prior judicial determination of probable cause. Because of its

relevance, the Court's discussion merits quotation at some length:

> The warrant clause of the Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." *Coolidge v. New Hampshire,* 403 U.S. at 481 [91 S.Ct. at 2046], 29 L.Ed.2d at 592.
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> Over two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals whom the *officer* might conclude were guilty of seditious libel. "It is not fit," said Mansfield, "that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." *Leach v. Three of the King's Messengers,* 19 How St Tr 1001, 1027 (1765).
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> Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive. . . . Inherent in the concept of a warrant is its issuance by a "neutral and detached magistrate." *Coolidge v. New Hampshire,* supra, at 453 [91 S.Ct. at 2031], 29 L.Ed. 2d at 575. The further requirement of "probable cause" instructs the magistrate that baseless searches shall not proceed.
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> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords

> with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. John M. Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 ABAJ 943-944 (1963). The independent check upon executive discretion is not satisfied, as the Government argues, by "extremely limited" post-surveillance judicial review.

407 U.S. at 316-18, 92 S.Ct. at 2136-37 (footnotes and citations omitted). *See also Chimel v. California,* 395 U.S. 752, 761, 89 S.Ct. 2034, 2039, 23 L.Ed.2d 685 (1969) (quoting *McDonald*).

[8] These passages are clear and unequivocal: the Fourth Amendment requires that no warrant issue but upon probable cause, as determined by a neutral and detached magistrate. It is undisputed that the Dallas County procedures challenged here did not meet this requirement. The trial court therefore held them unconstitutional; we affirm its holding.[14]

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[14]Although the County grounded its argument primarily on *Gerstein,* it relied also on one paragraph of *Smart v. Jones,* 530 F.2d 64 (5th Cir.), *cert. denied,* 429 U.S. 887, 97 S.Ct. 240, 50 L.Ed.2d 168 (1976). In that paragraph, we stated.

> There is no merit to the issues which imply that Deputy Grandstaff initiated this entire altercation by attempting to serve invalid civil process on the plaintiff. The capias, Texas' equivalent to an arrest warrant which is "issued by the court or clerk and directed 'To any peace officer of the State of Texas' " Art. 23.01, Tex.C.Crim.P., was neither improperly executed, nor violative of due process.

530 F.2d at 66. This language falls far short of affirming the constitutionality of the practises at issue here; the County's reliance on *Smart* is misplaced.

Liability for Money Damages

The jury awarded Crane money damages and assessed them against the County and the District Attorney. The trial court held the County immune from liability for damages because "the accused practices were implemented by state officers, not county officers. The acts were neither done for the county nor subject to its control. The accused practices can then hardly be said to be a county custom or practice." *Crane v. Texas*, 534 F.Supp. 1237, 1246 (N.D.Tex. 1982). The trial court held the District Attorney immune from liability for money damages because there was no evidence that he breached a duty to the County.[15] *Id.* Crane contends that the trial court erred in

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[15]This holding, although unaccompanied by supporting citation, appears premised on a line of cases beginning with *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), *cert. denied sub nom. Roberts v. Smith*, 404 U.S. 866, 92 S.Ct. 83, 30 L.Ed.2d 110 (1971), extending through *Sims v. Adams*, 537 F.2d 829 (5th Cir.1976), and *Howard v. Fortenberry*, 723 F.2d 1206 (5th Cir.), *vacated in part*, 728 F.2d 712 (1984), to, most recently, *Craine v. Alexander*, 756 F.2d 1070 (5th Cir. 1985), in which this Court has stated that breach of a duty imposed by state law must be shown by a plaintiff seeking to impose liability under § 1983. This showing is not required, however, of a plaintiff alleging that defendants were directly responsible for the offending conduct. The distinction is clearly set forth in *Sims:*

> The language of § 1983 requires a degree of causation as an element of individual liability, but it does not specifically require "personal participation." The proper question is therefore whether the complaint adequately alleges the requisite causal connection between the supervisory defendants' actions and a deprivation of plaintiff's constitutional rights. "Personal participation" is only one of several theories which can be used to establish causation.
> . . .

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holding all defendants immune from liability for money damages. We agree, although for reasons different from those offered by Crane.

[9, 10] The trial court's rationale for County immunity appears premised on a finding that the District Attorney was an officer of the state. This finding presents problems. State officials partake of the Eleventh Amendment immunity of the states they serve. *Edelman,* 415 U.S. at 663, 94 S.Ct. at 1355; *Familias Unidas,* 619 F.2d at 404-05. "[T]he Supreme Court has flatly stated that neither the statutory language nor legislative history of section 1983 evinces a sufficient, express congressional intention to override the traditional immunities of the states to allow private damage actions against the states *and their officials* pursuant to that statute." *Familias Unidas,* 619 F. 2d at 405 (emphasis added), *citing Quern v. Jordan,* 440 U.S. 332, 339, 99 S.Ct. 1139, 1144, 59 L.Ed.2d 358 (1979). The Eleventh Amendment thus bars a private suit for damages brought under § 1983 against a state official; the exception to Eleventh Amendment immunity provided by

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> *Another theory* which includes the requisite causation is that a supervisory defendant is subject to § 1983 liability when he breaches a duty imposed by state or local law, and this breach causes plaintiff's constitutional injury.

537 F.2d at 831 (emphasis added) (citations and footnote omitted); *see Howard,* 723 F.2d at 1209 (showing of breach of state-law duty would be required where no defendant was directly responsible for violation).

These cases thus provide alternative theories for imposition of § 1983 liability; *either* direct responsibility *or* breach of a state-law duty. Given the district attorney's direct responsibility for the Dallas County system, it was unnecessary for Crane to prove that he breached a duty imposed by State law.

Ex parte Young does not extend to such actions. *Pennhurst,* 465 U.S. at —, 104 S.Ct. at 908-909, 79 L.Ed.2d at 79-80. Further, the Supreme Court held in *Pennhurst* that the *Ex parte Young* exception does not extend to violations of state law; thus, "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the state that is protected by the Eleventh Amendment," and "this principle applies as well to state law claims brought into federal court under pendent jurisdiction." 465 U.S. at —, 104 S.Ct. at 919, 79 L.Ed.2d at 92.[16]

The import of these principles is clear. As a state official, the District Attorney was immune from more than liability for damages; the jurisdictional bar of the Eleventh Amendment rendered him immune from an action for damages. The trial court was thus required to dismiss Crane's action for damages against the District Attorney if it found him to be a state official.[17] By permitting the

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[16]A finding that the County District Attorney, the County Judges, and the County Clerk were state officials would therefore, under *Pennhurst,* deprive the trial court of jurisdiction to render its declaratory judgment that their practices violated state law. Because we conclude that defendants here were officers of the County, not of the State, we need not disturb the trial court's judgment, to which *Pennhurst* does not apply.

[17]This analysis, which applies as well to the County Judges and the County Clerk, pertains only to suits against the officials in their official capacities. Tle Eleventh Amendment is obviously no bar to actions for damages against officials sued in their individual capacities; *see Wells v. Hutchinson,* 499 F.Supp. 174, 204 n. 40 (E.D.Tex.1980); in such actions, defendants must plead and prove the affirmative defense of qualified or "good faith" immunity. *See Familias Unidas,* 619 F.2d at 403 and n. 12; *see also Harlow v. Fitzgerald,* 457 U.S. 800, 815-18 and n. 30, 102 S.Ct. 2727, 2738-39 and n. 30, 73 L.Ed.2d 396 (1982).

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action to proceed, however, the trial court implicitly found the District Attorney to be something other than a state officer, to wit, an official of a local unit of government itself unprotected by the Eleventh Amendment. This conclusion is buttressed by the trial court's reason for holding the District Attorney immune from liability for damages. If the District Attorney were a state officer, the Eleventh Amendment alone would render him immune from such liability; in this circumstance, whether he breached a duty owed to the County would be perfectly irrelevant.

[11] It is apparent from the foregoing that the trial court's reasoning in this regard cannot be made internally consistent. We therefore turn to the second premise on which the trial court grounded the County's immunity from damages: that the accused practices "were neither done for the county nor subject to its control." 534 F. Supp. at 1246. In *Monell,* the Supreme Court held that local governments "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690, 98 S.Ct. at 2573. This Court, en banc, has construed *Monell* to permit the imposition of

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Although the matter is not free from doubt, we assume here that defendants were sued in their official capacities. This assumption is grounded both on defendants' assertion of Eleventh Amendment immunity and on the trial court's award of attorneys' fees against the state, pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. Under that Act, fee awards are "payable by the states when their officials are sued in their official capacities." *Hutto v. Finney,* 437 U.S. 678, 694, 98 S.Ct. 2565, 2575, 57 L.Ed.2d 522 (1978).

municipal liability when the alleged deprivation of federally guaranteed rights is inflicted pursuant to official policy, official policy being defined as

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc), *quoting Bennett v. City of Slidell,* 735 F.2d 861, 862 (5th Cir.1984) (en banc). Although the trial court did not have the benefit of this formulation, it did consider whether the challenged practices constituted County policy under *Monell,* and concluded that they did not because the practices were not subject to County control. 534 F.Supp. at 1237. The trial court's conclusion is flatly contradicted by the course of events of this litigation and cannot be reconciled therewith.

In its Memorandum Order of November 30, 1981, the trial court asked the defendants for "concrete proposals" for a new Dallas County system of issuing capias. *Id.* at 13. The judges and the District Attorney submitted such

proposals; they were filed with the court on December 9 and 11, 1981, respectively. The District Attorney had begun to make changes in the system even before this, however. A letter from the District Attorney to the Chief of Police of the City of Dallas, dated July 20, 1981, announces "I plan certain changes in the procedure for the filing of criminal cases with the Dallas County District Attorney's Office." A memorandum from the District Attorney to "All Police Departments and Agencies Filing Cases with the Dallas County District Attorney's Office," dated September 17, 1981, states "Certain changes in the procedure for the filing of criminal cases with the Dallas County District Attorney's Office are presently (sic) being implemented." A letter from the District Attorney to Judge Ellis of the Dallas County Criminal Court dated December 7, 1981, begins, "As a result of the recent decision by Judge Higginbotham in Cause No. CA 3-80-0978-6, styled *Stephen C. Crane versus State of Texas, et al,* the following is the form of action this office would like to take—with your cooperation." In none of these communications is there the slightest indication that the District Attorney acted other than independently; there is no hint of any perceived necessity by the District Attorney to consult with or invite the participation of any state official, for example, a member of the State Attorney General's Office. To the contrary, the record plainly shows that the District Attorney was alone responsible for the County system and could change it at will. This fact is implicit in the trial court's order of February 4, 1982, denying injunctive relief because

> [B]eginning as early as June 1981, some five months before this court's Memorandum Order of November 30, 1981, defendants voluntarily changed the method

> used to issue capias in misdemeanor cases. Implementation of this change has proceeded at a steady pace. At all times, defendants have demonstrated by concrete action their good faith effort to achieve a sound and legally sufficient system.

Id.[18] In *Familias Unidas,* this Court described the circumstances in which the acts of a county judge would constitute official county policy under *Monell*:

> [A]t least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.

619 F.2d at 404. This language, which "relates to the officer who obtains policymaking authority by virtue of the office to which that officer is elected," was explicitly affirmed in *Bennett,* 735 F.2d at 862. It clearly covers the acts of the District Attorney here. His authority to establish County procedures for issuing misdemeanor capias derived from the County office to which he was elected by County voters. That he had such authority is patent and admitted by the District Attorney himself; his first amended answer, filed with the court on September 12, 1980,

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[18]See *also* Memorandum Order of September 8, 1982, in which the trial court stated,

> Moreover, though *Dallas County changed its system* for reasons including 'administrative prudence,' it is clear that Crane's suit challenging the system was a catalyst in effectuating that change.

Id. at 1-2 (citation omitted) (emphasis added). The conflict between this statement and the trial court's conclusion that the County had no control over its system is obvious and irreconcilable.

states that he "has established policies and procedures of an administrative nature only as to the filing and processing of criminal information in Dallas County." *Id.* at 4. Thus, because the ultimate authority for determining County capias procedures reposed in the District Attorney, an elected County official, his decisions in that regard must be considered official policy attributable to the County. As we stated in *Bowen v. Watkins,* 669 F.2d 979 (5th Cir.1982),

> At some level of authority, there must be an official whose acts reflect governmental policy, for the government necessarily acts through its agents. Thus the question becomes one of identifying the official who has authority to make policy; then municipal liability attaches to acts performed pursuant to that policy. When an official has final authority in a matter involving the selection of goals or of means of achieving goals, his choices represent governmental policy.

669 F.2d at 989. The County in this case acted through the District Attorney; he selected the means by which the County was to achieve a sound and legally sufficient capias system. His choice of an unsound and legally insufficient system represents County policy for which the County is liable. The trial court's finding to the contrary was error, and we reverse it.[19]

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[19]The trial court grounded its finding in part on our statement in *Familias Unidas* that the duty of a County judge "in implementing section 4.28, much like that of a county sheriff in enforcing a state law, may more fairly be characterized as the effectuation of the policy of the State of Texas embodied in that statute, for which the citizens of a particular county should not bear singular responsibility." 619 F.2d at 404. Thus, because defendants here were "enforcing the state criminal law," 534 F.Supp. at 1245, the trial court found the County immune.

(Continued on following page)

[12] Although the jury found that the District Attorney knew, or should have known, that the Dallas County capias system infringed Crane's clearly established constitutional rights, the trial court held him immune from liability for damages. It found that the District Attorney had no duty to advise the County on its capias system; there being no duty, there could be no breach and therefore no liability. This finding was grounded on Tex.Rev. Civ.Stat.Ann. art. 334 (Vernon 1982), which provides, "The district and county attorneys, upon request, shall

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(Continued from previous page)

This reading of *Familias Unidas* ignores two crucial distinctions between that case and this. First, the defendants in *Familias Unidas* complied with a state statutory scheme later found to be unconstitutional; the error was in the scheme, not in defendants' interpretation of it. Here, defendants failed to comply with a constitutional state statutory scheme; the error was in their interpretation, not in the scheme.

Second, the statute at issue in *Familias Unidas* was narrowly drawn, leaving little, if any, room for the exercise of discretion in its implementation. By contrast, the statutes in question here were so drawn as to *require* the exercise of discretion. The point is clearly made in *Familias Unidas:* "The narrow authority delegated to the county judge in section 4.28, however, bears no relation to his traditional role in the administration of county government *or to the discretionary powers delegated to him by state statute* in aid of that role." 619 F.2d at 404 (emphasis added). *Familias Unidas* cannot thus properly be construed to immunize local governments from § 1983 damage liability for actions within the discretion of their officials which prove to be both unconstitutional and illegal under state law. *See Williams v. Thomas,* 692 F.2d 1032, 1039-40 (5th Cir.1982), *cert. denied,* — U.S. —, 103 S.Ct. 3115, 77 L.Ed.2d 1369 (1983); *Barrett v. Thomas,* 649 F.2d 1193, 1201 (5th Cir.1981), *cert. denied,* 456 U.S. 925, 102 S.Ct. 1969, 72 L.Ed.2d 440 (1982). It stands rather for the unexceptionable proposition that local governments and their officials who act in conformance with a state statutory scheme will not be held liable for § 1983 damages if the scheme is later held unconstitutional. *Familias Unidas* therefore provides no support for the trial court's finding in this case.

give an opinion or advice in writing to any county or precinct officer of their district or county, touching their official duties." There was no evidence that any County official had requested the District Attorney's advice on the County's capias system. The statute plainly did not require the District Attorney to give the County unsolicited legal advice. Therefore, the trial court reasoned, the District Attorney could not be liable for not doing something he had no duty to do.

The obvious flaw in this reasoning is that the statute quoted above has no application to actions taken by the District Attorney in the exercise of his discretionary authority. Where, as here, the District Attorney *himself* established the procedures to be followed by the County in issuing misdemeanor capias, the statute does not and could not apply unless it were construed to require a County official to ask the District Attorney to provide legal advice to himself about his own system. The suggestion is not plausible. It is true, as the trial court noted, that the District Attorney has no duty, statutory or otherwise, to monitor independently the manner in which other officials performed their public duties. This fact does not, however, relieve him of the duty to monitor his own actions, nor does it relieve him of responsibility when those actions result in the deprivation of federally guaranteed rights. The District Attorney established the procedures used in Dallas County to issue misdemeanor capias. His duty to do so in accordance with the United States Constitution and the laws of Texas was one entirely independent of any duty to render legal advice to others. Thus, the trial court erred in finding the District Attorney immune from liability by reason of Tex.Rev.Civ.Stat.

Ann. art. 334. Neither that statute nor any other provides him with immunity from liability for actions that infringe the constitutional rights of others. We therefore hold the District Attorney liable for the damages awarded by the jury and assessed against him.

We do not, however, hold him liable in his individual capacity. The conduct complained of was that of a County officer engaged in the furtherance of his duties; we have found that conduct to constitute official policy attributable to the County. This finding, as well as those factors discussed *supra* n. 15, compel the conclusion that Crane brought suit against the District Attorney in his official capacity. *See Williams,* 692 F.2d at 1040. Because the defense of qualified, good faith immunity is not available to a defendant sued in his official capacity, *Owen v. City of Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); *Barrett,* 649 F.2d at 1203 (Brown, J., concurring); *Familias Unidas,* 619 F.2d at 403 n. 12, it is thus unnecssary for us to determine whether, as Crane contends, the District Attorney was unprotected by such immunity.[20]

For the foregoing reasons, we hold that the trial court erred in finding the District Attorney and the County immune from liability for money damages. The jury's

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[20]In any event, it is by no means clear that this point is properly before this Court. The trial court did not ground its finding that the District Attorney was not liable for damages on that officer's qualified, good faith immunity; such immunity is not even mentioned in the trial court's opinion. There would thus appear to be no finding of qualified immunity for Crane to assign as error. The question would be of some importance had we found the instant action to be one against the District Attorney in his individual capacity; it is irrelevant in view of our conclusion that the District Attorney was sued in his official capacity.

award of money damages to Crane is accordingly reinstated. Because the injury for which damages were awarded resulted from the official policy of the County as embodied in the official actions of the District Attorney, the County will be liable for those damages assessed against the District Attorney as well as those assessed against itself.

Liability for Attorneys' Fees

The trial court awarded Crane attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. It assessed the fees against the State of Texas because "[t]he actors whose conduct was at issue in the maintenance of the warrant system and its specific application to Crane were wearing their state hats." Memorandum Order of September 8, 1982, at 3. The State of Texas contends that this was error, arguing that the fee award should have been assessed against Dallas County. We agree.

[13] The general rule regarding § 1988 attorneys' fees is set forth in *Familias Unidas:*

> An award of attorneys' fees under section 1988 against an individual in his official capacity ordinarily is treated as an award against the particular governmental body of which he is a representative, and is to be paid from the funds of that body, whether or not it is a named party to the suit.

619 F.2d at 406, *citing Hutto v. Finney,* 437 U.S. 678, 693-700, 98 S.Ct. 2565, 2574-2579, 57 L.Ed.2d 522 (1978). Thus, attorneys' fees are properly assessed against the state when its officials are sued in their official capacities, *Hutto,* 437 U.S. at 693-94, 98 S.Ct. at 2574-75, and when their conduct may fairly be said to represent its official

policy. *See Barrett,* 649 F.2d at 1201; *Familias Unidas,* 619 F.2d at 406. Neither condition is met here.

[14] Crane did not sue the individual defendants for actions taken on behalf of the State; rather, he sued them because of the roles they played in establishing and implementing the Dallas County system of issuing misdemeanor capias. Defendants created that system and controlled it for the County, not for the State; therefore, in so doing they acted as County, not State, officials. The system they created and controlled violated Texas law; thus, it can scarcely be said to represent the official policy of the State of Texas.[21] We have held instead that it represented the official policy of Dallas County. The award of Crane's attorneys' fees must therefore run against the County; *see Williams,* 692 F.2d at 1040; *Barrett,* 649 F.2d at 1201-02. Accordingly, we reverse[22] the trial court's assessment of those fees against the State, and render judgment holding Dallas County liable for them.

Conclusion

In sum, we hold that neither Dallas County nor its officials are protected by the immunity provided by the

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[21]*Familias Unidas* is not to the contrary. In *Familias Unidas* we stated that the statute in question, to which defendants had conformed their conduct, "obviously represents the official policy of the State." 619 F.2d at 404. The same may be said of the statutes involved in this case. The conduct at issue here, however, violated rather than conformed to those statutes; it would be anomalous indeed to regard as official State policy actions taken by County officials in violation of State law.

[22]Our reversal of the trial court's award of § 1988 attorneys' fees against the State is necessarily predicated on a finding that the award constituted an abuse of the trial court's discretion. *Dean v. Gladney,* 621 F.2d 1331, 1337 (5th Cir.1980); *Morrow v. Dillard,* 580 F.2d 1284, 1300 (5th Cir. 1978).

Eleventh Amendment and that both the County and its officials are "persons" within the meaning of 42 U.S.C. § 1983. We affirm the trial court's findings that the Dallas County system of issuing misdemeanor capias violated both Texas law and the United States Constitution. We reverse the findings of immunity from liability for money damages as to the County and the District Attorney, and hold the former liable for its official policy and the latter liable in his official capacity. We therefore reinstate the jury's award of money damages. We reverse the assessment of attorneys' fees against the State of Texas, and render judgment against the County for the fees. It is so

ORDERED.

APPENDIX B

Stephen C. CRANE, on behalf of himself
and others similarly situated,
Plaintiff-Appellee Cross Appellant,

v.

STATE OF TEXAS,
Defendant-Appellant,

v.

COUNTY OF DALLAS, Ben Ellis, John Orvis,
Mike Schwille, Berlaind Brashear and Chuck
Miller, Defendants-Appellants Cross Appellees,

v.

Henry WADE and L. E. Murdoch,
Defendants-Appellees.

No. 83-1650.

United States Court of Appeals,
Fifth Circuit.

July 22, 1985.

Plaintiff brought action challenging county's practice of issuing misdemeanor capias without finding of probable cause. The United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., finding that both county and district attorney were immune, awarded plaintiff only attorney fees, but the Court of Appeals, 759 F.2d 412, reversed in part, finding neither county nor district attorney immune. On motion for rehearing, the Court of Appeals held that: (1) district attorney was

primarily county official, and county could be held liable for district attorney's unlawful practice of issuing capias without probable cause, and (2) matter of attorney fees on appeal was more appropriately addressed by district court in first instance.

Prior opinion vacated in part; petition denied in part.

1. Civil Rights — 137

Texas district attorney was primarily county official, despite ultimately deriving powers of his office from state, and county could be held liable for district attorney's practice of issuing misdemeanor capias without finding of probable cause, in violation of Fourth Amendment, U.S.C.A. Const.Amend. 4, 11; Vernon's Ann.Texas Civ. St. arts. 323, 328, 332b-2(b), 332d, 333; Vernon's Ann. Texas Const. Art. 5, §§ 19-21.

2. Civil Rights — 13.17(23)

In civil rights action against various governmental parties, matter of plaintiff's entitlement to attorneys fees and costs on appeal, as well as his claim for restoration of portion of trial attorneys' fees because of developments on appeal, were more appropriately addressed by district court in first instance.

Earl Luna, Dallas, Tex., for Ellis et al. and Dallas County.

Jim Mattox, Atty. Gen., Mary F. Keller, Lawrence J. King, Asst. Attys. Gen., Austin, Tex., for State of Tex.

Peter Lesser, Johnston & Larson, Douglas R. Larson, Dallas, Tex., for Crane.

Sue L. Lagarde, Dallas, Tex., for appellees Henry Wade and Larry Murdoch.

Appeals from the United States District Court for the Northern District of Texas.

ON PETITIONS FOR REHEARING
AND SUGGESTIONS FOR
REHEARING EN BANC

(Opinion May 2, 1985, 5, Cir., 1985, 759 F.2d 412)

Before GEE, WILLIAMS, and JOLLY, Circuit Judges.

PER CURIAM:

[1] On motion for rehearing, appellant Dallas County advances one contention requiring comment: that a Texas district attorney is an officer of the State of Texas, not of the county in which he serves, and hence that Dallas County is not responsible for the policies which its District Attorney set for it. The point is a nice one and fairly debatable. A complementary contention by the appellant district attorney maintains that as such a State official he partakes of its Eleventh Amendment immunity.

It is indubitable that a Texas district attorney has numerous, if relatively minor, attributes of a State official. As appellants point out, the geographic extent of his office's authority is created by a specific state statute for each territory ("district") within the state, some few of which comprise more than one county. *E.g.*, Tex.Rev. Civ.Stat.Ann. art. 332b-2(b) (64th Judicial District: Hale and Swisher Counties). In the event of a vacancy in his office, the Governor appoints his interim successor. Tex. Rev.Civ.Stat.Ann. art. 328 (1973). His bond for faithful performance of his duties runs to the Governor of the

State. Tex.Rev.Civ.Stat.Ann. art. 323 (1973). A state administrative body, the Prosecutor's Council, exists to discipline and assist the holders of his office. Tex.Rev. Civ.Stat. Ann. art. 322d (1985). The District Attorney is required by statute to make reports to the State Attorney General upon his request. Tex.Rev.Civ. Stat.Ann. art. 333 (1973). His office is created by Article V, § 21, of the State Constitution; and a text on state law describes him, partly on the basis of this, as "an officer of the state." 31 Tex.Jur.3rd 394.[1]

Other and more significant factors, generally speaking, argue that he is a local official. He is elected by the voters of his district, usually one county. Tex.Const. art. V, § 21. His major powers and duties—which concern the prosecution of serious crimes and which he exercises alone and without responsibility to the State Attorney General, who has no general prosecutorial powers—are limited to the territory of his district. He is paid by county funds, although these are partly reimbursed by the state. And the significance of the creation of his office by the State Constitution is diminished by the circumstance that other local offices are created by it as well. See *e.g.*, Article V, § 19 (Justices of the peace) and § 20 (County clerks). In sum, much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but limited in the exercise of those powers to the county, filled by its

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[1]Another cited basis is dubious, a reference to the duties of prosecutors in *Lackey v. State*, 148 Tex.Cr.R. 623, 190 S.W.2d 364, 365 (1945) ("[P]rosecuting attorneys are officers of the state, whose duty is to see that justice is done, . . ."). It seems that this reference is to the "state" in the abstract, rather than as a particular political entity.

voters, and paid for with its funds. As for the case in hand, District Attorney Wade was responsible for the county policy attacked and conclusively demonstrated his ability to alter it on his own by doing that very thing.

For present purposes, then, we conclude that he is properly viewed as a county official, elected by its voters and responsible for its relevant policy. In such circumstances, we see no injustice in holding the County responsible for his actions of this sort. Doubtless he is also in some senses an officer of the State (or of the state), at least as ultimately deriving the powers of his office from that source. But even were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements. At all events, his immunity or want of it is of little practical consequence. The joint and several judgment against him in his official capacity only and against the county will expend itself on the county treasury. See, *Kentucky, dba Bureau of State Police, Petitioner v. James E. Graham, et al.*, —U.S.—, 105 S.Ct. 3099, 85 L.Ed.2d — (1985).

[2] Plaintiff has filed with us a motion for attorneys' fees and costs on appeal, as well as one for restoration of a portion of trial attorneys' fees because of developments on appeal. We conclude that such matters are better addressed as one by the district court, and we therefore amend our original disposition to VACATE the award of attorneys' fees heretofore made and REMAND to permit the district to do so.

In all other respects, the Petitions for Rehearing are DENIED; and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

APPENDIX C

Stephen C. CRANE, et al., Plaintiffs,

v.

The STATE OF TEXAS, et al., Defendants.

CIVIL ACTION NO. CA-3-80-0978-G

United States District Court,
N. D. Texas,
Dallas Division.

March 11, 1982.

Civil rights action was filed. Following jury trial, the District Court, Patrick E. Higginbotham, J., held that: (1) county could not be held liable for any civil rights violations engaged in by criminal district attorney, the county clerk, or the county criminal judges, in that those officers function as state, not county, officers; and (2) criminal district attorney could not be held liable for not advising county to change its system for issuing misdemeanor capias.

Ordered accordingly.

1. Counties—21½

Unless a particular county action is explicitly authorized by the Constitution or a statute, the county will not be allowed to exercise it.

2. Civil Rights—13.7

County could not be held liable for any civil rights violations engaged in by criminal district attorney, the county clerk, or county criminal judges, where prosecutorial activities were undertaken to meet a state-created

duty and were not subject to control by the county. 42 U.S.C.A. § 1983.

3. Civil Rights—13.7

County criminal district attorney could not be held liable in civil rights action for not advising county to change its system for issuing misdemeanor capias, in that primary task of criminal district attorney is to represent the state in criminal and civil matters, there was no evidence that any county official submitted a request, written or otherwise, asking district attorney's advice concerning the county system for issuing misdemeanor capias, and criminal district attorney has a limited responsibility to the county. Vernon's Ann.Tex.Const.Art. 5, § 21; Vernon's Ann.Tex.Civ.St. arts. 326k-1, 332c, 332d, 334; 42 U.S.C.A. § 1983.

Douglas R. Larson, Johnston & Larson, Peter Lesser, Dallas, Tex., for American Civil Liberties Union.

Gerald C. Carruth, Asst. Atty. Gen., Austin, Tex., for intervenor.

Chas. L. Baldree, Sue L. LaGarde, J. Steven Bush, Asst. Dist. Attys., Federal Litigation Section, Dallas, Tex., for Henry Wade, Murdoch and State of Tex.

Earl Luna, Law Offices of Earl Luna, Dallas, Tex., for Dallas County, Ben Ellis, John Orvis, Mike Schwille, Harold Entz, Tom Price, Berlaind Brashear and Chuck Miller.

Joseph G. Werner, Asst. City Atty., Dallas, Tex., for Perez Woods, City of Dallas: (Dismissed After Trial).

MEMORANDUM OPINION

PATRICK E. HIGGINBOTHAM, District Judge.

I. *Factual Background*

On April 21, 1980, Stephen C. Crane was arrested at his office and jailed pursuant to a misdemeanor capias alleging that he knowingly exhibited obscene film at the Crystal Adult Theater in Dallas. It later developed that Crane was arrested only because a lawyer with whom Crane shares office space listed him, without his knowledge or consent, as one of three "initial directors" in the 1979 Articles of Incorporation of a Texas corporation known as the Crystal Theater. The charges against Crane were dismissed for insufficient evidence on the state's motion. Crane filed suit charging that his arrest was illegal and was the by-product of an illegal system of misdemeanor arrests. The court bifurcated trial into a consideration of whether the challenged practices were legal and whether Crane was entitled to damages.

The system which was used in Dallas County for issuing misdemeanor capias at the time Stephen Crane was arrested was described in detail in an earlier order dealing with the legality of the system. Memorandum Order, No. CA 3-80-0978-G (Nov. 30, 1981). Briefly, under this system the county clerk's office would issue misdemeanor capias without a probable cause determination. Prior to issuing misdemeanor capias, assistant county clerks would perform the clerical task of typing information from a form, labeled an affidavit, which was presented by an assistant district attorney from the Criminal District Attorney's office.

A jury trial was conducted to determine whether Crane was entitled to money damages. The jury determined that Crane was entitled to $15,000 for injuries caused by his arrest and to $25,000 for injuries caused by his being charged with promoting obscenity. Crane sought damages from a number of defendants including the County Clerk and the three city police officers who arrested him, but the jury only awarded damages against Dallas County and Henry Wade, the Criminal District Attorney of Dallas County. The liability of Henry Wade is discussed in Part IV of this memorandum order.

This court must decide whether the county is liable because the practices found to be illegal were a "county policy or custom." In *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court concluded that a local government unit could be sued as a "person" under 42 U.S.C. § 1983 if that governmental entity or an official representing that entity maintains or practices an unlawful or unconstitutional custom or policy which causes the deprivation of individual rights. Resolution of the issue requires a consideration of (1) the relationship between the county and the state and (2) the nature of the office of those responsible for the prosecutorial functions.

II. *The Nature of Texas Counties and Their Relationship to the State*

A. *The Creation and Structure of Counties*

The lack of local control over counties is evidenced in the state's power to create and dissolve them and that power's constitutional provenance. Since the 1845 constitution, the legislature has had the power to create and

dissolve counties within certain constitutional guidelines. Tex.Const. art. 9, § 1. Counties, unlike other governmental entities such as hospital districts, cannot be created by local initiative.[1] Tex.Const. art. 9, § 4.

The structure of Texas county government has changed little over the 150 years since the Republic's first constitution. This lack of change is due largely to the fact that the structure of county government is fixed in the constitution and cannot be changed without a constitutional amendment. The inflexibility of county governmental structure is recognized in the interpretive commentary to Tex.Const. art. 5, § 18:

> The close restrictions placed in the constitution relative to counties made fundamental changes in the organization of most counties almost impossible. In 1930 there was initiated a movement for county home rule to overcome this inflexible control. A constitutional amendment providing for county home rule was passed by the legislature in 1933 and approved by the voters the same year. (See Art. 9, Sec. 3).

Because the home rule amendment was repealed in 1969, counties remain with a constitutionally fixed governmental structure.

The constitutional source of its structure also reduces the control of the local citizenry over county government. An example of the lack of local control over the structure of local county government is found in *Moncrief v. Gurley*, 609 S.W.2d 863 (Tex.Civ.App — Fort Worth 1980, writ

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[1]In *Laje v. R. E. Thomason*, 665 F.2d 724 (5th Cir. 1982), the fifth circuit emphasized that a hospital district was created by local initiative in deciding that the district was not entitled to eleventh amendment immunity.

ref'd n. r. e.), which involved the question of whether the voters of the county could abolish the office of County Treasurer. The state legislature enacted a statute providing for an election in Tarrant County concerning consolidation of the offices of County Treasurer and County Auditor. Based on its reading of several constitutional provisions, the court concluded that the County Treasurer was a "constitutional officer" and as such his office could could not be abolished except by constitutional amendment. Thus, even with legislative approval, the citizens of a county are not free to choose its governmental structure because constitutional amendments require statewide electoral approval. By way of contrast, the structure of city government is not constitutionally fixed and can be changed by amendment of the city's charter. Such amendments require only *local* electoral approval and legislative approval. This is so with the several types of cities under Texas government. Cities with greater than 5,000 inhabitants can adopt a "home rule" charter which provides them with certain enumerated powers, Tex.Rev.Civ.Stat. Ann. arts. 1165-1182 (Vernon 1982), or they can adopt an individualized charter. Either type of charter is essentially a contract between the state and city outlining the city's powers in broad terms. There are also some small cities (usually with a population of less than 5,000) which are known as "general law cities" and whose powers are more restricted. By statute providing for "home rule" by cities, they have the power to create a "commission, aldermanic, or other form of government; [and to create] offices, the manner and mode of selecting officers and prescribing their qualifications, duties, compensation and tenure of office." Tex. Rev.Civ.Stat.Ann. art 1175 (Vernon 1982).

I turn now to the responsibilities of county officials, whether elected or appointed, how vacancies are filled, how they are compensated, and how such officers can be removed.

B. *The Duality of Texas Counties and County Officers*

Counties in Texas have dual functions. They serve as administrative arms of the state, and they perform functions of local interest as well. County officers reflect this duality.

1. *County Officials Responsible for the Prosecutorial Function*

a. *The County Commissioners Court: The County Commissioners and the County Judge*

Tex.Const. art. 5, § 15 provides for the office of County Judge: ". . . [T]here shall be elected in each county, by the qualified voters, a County Judge, who . . . shall hold his office for four years . . . [and] shall receive such compensation for his services such fees and prerequisites as may be prescribed by law." The County Judge presides over the principal governing body of the County Commissioners Court.

> . . . Each county shall . . . be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business as is conferred by the Constitution and the laws of the State, or may hereafter be prescribed.

Texas Const. art. 5, § 18. The County Judge also has the responsibility of supervising local and state elections.

Many of the duties of the County Commissioners Court, which is the chief administrative body in the county, are prescribed in Tex.Rev.Civ.Stat.Ann. art. 2351. These duties can be summarized as follows:

1. Lay off the county into precincts for the purpose of election of justices of the peace and commissioners;
2. Establish, repair and exercise general control over contract to sell roads, highways, bridges, ferries, and airports and to subterranean waters;
3. Administer lands granted by state to county for education or schools;
4. Audit and settle all accounts against the county and direct their payment;
5. Provide for support and burial of paupers and for the support of the emotionally disturbed and mentally retarded;
6. Assist the federal government in the administration of food stamp and subsidized housing programs;
7. Provide and keep in repair courthouses, jails and all necessary public buildings;
8. Provide seals required by law for the county and district courts;
9. Punish contempts with small fines and jail terms up to 24 hours;
10. Issue all notices, citations, writs and process necessary to execute its powers; and
11. Such court shall have all such other powers and jurisdiction and shall perform all such other duties, as are now or hereafter prescribed by law.

Tex.Civ.Stat.Ann. art. 2351 (Vernon 1982).

As will be discussed below in relation to the dual nature of county government, the powers which have been granted the county's administrative body have been narrowly construed.

The other duties of the Commissioners Court include approval of the county budget, setting the property tax rate within constitutional and statutory limits, Tex.Const. art. 8, § 9 (Vernon 1982), and collecting those taxes for both local and state purposes. The Commissioners Court is also empowered to fill vacancies in other offices including that of County Clerk, Tex.Const. art. 5, § 20, County Attorney, District Attorney or Criminal District Attorney, Tex.Const. art. 5, § 21. If there is a vacancy in the office of County Judge, the commissioners fill this vacancy, Tex. Const. art. 5, § 21, and if one of the commissioner's posts becomes vacant, the County Judge is empowered to fill it. Tex.Civ.Stat.Ann. art. 2341 (Vernon 1982). In order to ensure that the commissioners and the County Judge fulfill their duties, they are required to take an oath and provide a bond, which is payable to the County Treasurer. Tex.Rev.Civ.Stat.Ann. arts. 2340, 1928 (Vernon 1982). The County Judge is elected by all the voters of the county, Tex.Const. art. 5, § 15; Tex.Stat.Ann. art. 1927, and the commissioners are elected by the voters of their respective precincts, Tex.Const. art. 5, § 18, Tex.Rev.Civ.Stat.Ann. art. 2339 (Vernon 1982). The County Judge and the Commissioners can be suspended from office for "incompetency," Tex.Rev.Civ.Stat.Ann. art. 5972 (Vernon 1982) or "official misconduct," *id.* art. 5973, by a state district court judge. *Id.* art. 5982. They can be removed from office for

the same reasons after a formal complaint is filed and a trial is conducted. *Id.* arts. 5970, 5976-82. The statutes contemplate a trial to a jury over which a district court judge presides. *Id.* These procedures also govern the suspension and removal of other officers such as the County Clerk and statutory county judges. In contrast, officers in cities with home rule and in cities with charters are removed after a trial before the city's mayor and aldermen. *Id.* arts. 5992-5993. Commissioners are paid a salary out of the county's Road and Bridge and General Funds, *id.* art. 2350, or out of the Officer's Salary Fund. *Id.* art. 3912e, § 5. Revenues for the Officer's Salary Fund are generated by charging fees for the various services performed by officers such as the County Clerk and County Attorney (e.g., a fee is charged by the clerk for recording deeds and the state pays fees to officers who assist it in criminal prosecutions). The salary of the County Judge is also paid out of this fund. *Id.* The legislature has the power to appropriate money to these funds to supplement the revenues generated by fee collections. *Id.* art. 3912e, § 6.

b. *The Criminal District Attorney*

Three types of attorneys are assigned tasks in Texas government. This case concerns the Criminal District Attorney of Dallas County, but it should be remembered that county attorneys perform essentially the same tasks as Criminal District Attorneys. The primary task of a Criminal District Attorney is to represent the state in criminal and civil matters. He is almost wholly "a judicial officer of the state and has very little to do with the administration of the county." H. G. James and I. Stewart, *County*

Government in Texas 42 (2d ed. 1925). He does, however, perform certain tasks for the county government. He assists the county with tax collection, Tex. Tax.-Gen.Ann. § 6.30 (Vernon Pam.1981), represents county officials and employees in suits involving acts they performed as part of their public duties, *id.* art. 332c, and gives advice to county officers under certain circumstances. *Id.* art. 334. (This provision is discussed in relation to the claimed individual liability of the District Attorney). It is not, however, one of the prescribed legal duties of the county or criminal district attorney "to represent the county in its general legal business or the conduct of ordinary civil actions." *Hill Farm, Inc. v. Hill County,* 425 S.W.2d 414, 417 (Tex.Civ.App. — Waco, 1968), *aff'd on other grounds,* 436 S.W.2d 320 (Tex.1969).

The Criminal District Attorney must file a bond to insure that he will properly perform these duties. His bond, unlike that of the commissioners, County Judge, or County Clerk, is payable to the governor rather than the County Treasurer. Tex.Rev.Civ.Stat.Ann. art. 326k-1 (Vernon 1982).

Criminal District Attorneys are elected by the voters of the county. Tex.Rev.Civ.Stat. art. 1926-27. If the office of Criminal District Attorney becomes vacant, the County Commissioners Court is empowered to fill the vacancy until the next election. Tex.Const. art. 5, § 21. In some instances, the Criminal District Attorney receives a small salary directly from the state. The Criminal District Attorney of Dallas County receives $500 per annum from the state, Tex.Rev.Civ.Stat.Ann. art. 1926-27, § 4 (Vernon 1982), but the primary source of his salary is from the fees paid into the County's Officer's Salary Fund.

Id. arts. 3912e, § 5. As noted, the fees that go into this fund are for work the Criminal District Attorney performs in prosecuting criminal cases. Tex.Code Crim.Proc. arts. 1020-35 (Vernon 1982).

Until recently, the suspension and removal of Criminal District Attorneys was governed by the same procedures that controlled the suspension and removal of the County Judge, Commissioners, Clerk and other officers. Tex.Rev.Civ.Stat.Ann. arts. 5970-5989 (Vernon 1982). In 1979 the legislature created a centralized agency of the judicial department of state government with responsibility to supervise the operation of prosecuting (Criminal District, County and District) attorney's offices. *Id.* art. 332d. The Prosecutor's Council has nine members. Four are appointed by the governor and five are elected by the state's prosecuting attorneys. *Id.* art. 332d, § 3. The Council serves to aid the administration of prosecuting attorneys' offices. It is also empowered to "accept and investigate complaints of prosecuting attorney incompetency and misconduct." *Id.* art. 332d, § 8(4). In *McInnis v. State*, 603 S.W.2d 179 (Tex. 1980), the Texas Supreme Court contrasted the general suspension and removal procedures in Articles 5970-86 to those in Article 332d:

> Art. 5970, *et seq.*, including Art. 5986, apply to "All district and county attorneys" and to all county officers. These prescribed procedures are materially different from those encompassed within Art. 332d governing the removal of prosecuting attorneys, who are defined as inclusive of county, criminal or district attorneys. The Art. 5970, *et seq.*, proceeding, for example, may be initiated by a citizen of the State. An Art. 332d proceeding is initiated in the district court by the Council only after extensive investigation which may include a hearing by a master appointed by

the Supreme Court. Section 10(e) requires the appointment of a special judge to hear the case, and the appointment of an attorney to prosecute the case. No such requirements attach to the Art. 5970, *et seq.*, proceeding.

c. *The County Clerk*

Article 5, § 20 of the Texas Constitution provides for the office of county clerk. He is an elected official who also serves as a clerk of court to the district courts in the counties with a population of less than 8,000. *Id.* In larger counties, such as Dallas County, his duties include issuing marriage licenses, Tex.Rev.Civ.Stat.Ann. art. 1935 (Vernon 1982), recording deeds, mortgages and other instruments, *id.* art. 1941, and serving as a custodian of records. *Id.* art. 1942. In addition, the clerk is the exofficio clerk of the County Commissioners Court with the duty of keeping minutes of their proceedings. *Id.* art. 1940. He also assists the commissioners court by issuing all writs, notices and process necessary to execute its decisions. *Id.* art. 2345. The clerk takes an oath and posts a bond payable to the county.[2] *Id.* art. 1937, § 3. This bond can be substantial (it is fixed by the County Commissioners Court at an amount between $5,000 and $500,000, *id.* art. 1937, § 1), but the County commissioners Court is required to pay the premiums on the bond out of the general fund of the county. *Id.* art. 1937, § 5. A certified copy of the clerk's bond may be produced in the name of the county when it is sued by a party who has been injured by the clerk's actions. *Id.* art. 1937, § 1. The clerk is elected by the voters

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[2]It should be noted that at one time the County Clerk's bond was payable to the Governor. Tex.Rev.Civ.Stat. art. 1937 (Vernon 1964).

of the county for a four-year term, *id.* art. 1935; Tex.Const. art. 5, § 20, and vacancies in the office are filled by the Commissioners Court. *Id.* The clerk can be suspended and removed under the supervision of a state district judge under the same procedures that were described above in relation to the County Judge and County Commissioners. Tex.Rev.Stat.Ann. art. 5970-5987. The County Clerk is compensated out of the Officer's Salary Fund in the same manner as the County Judge, Commissioners and other officials. *Id.* arts. 3883i, § 8(b), § 12 and 3912e-4d, § 5. The state places fees in this fund when the clerk performs duties that aid criminal prosecutions.

The local electorate cannot abolish the offices of County Judge, County Clerk or Criminal District Attorney or combine their functions. *Id.* Their suspension and removal is supervised by district court judges. Tex.Rev.Civ.Stat. Ann. arts. 5970-5989 (Vernon 1982). These officers carry out a number of tasks for the state including the collection of taxes and supervision of elections. All of them can be described as "state" officers when performing state tasks. In fact, the Texas courts have described the County Sheriff, *Clark v. Finley,* 93 Tex. 171, 54 S.W. 343 (1898) and County Treasurer, *Moncrief v. Gurley,* 609 S.W.2d 863 (Tex.Civ.App.—Fort Worth 1980, writ ref'd n.r.e.) as state officers. On the other hand, these officers are locally elected and vacancies in these positions are filled by the County Commissioners Court.

Of the officers discussed, the criminal district attorney is most closely associated with and supervised by the state. He spends the vast majority of his time representing the state in criminal and civil matters; the state reimburses the county for time he spends representing the

state in criminal matters; his bond is payable to the governor rather than the county treasury; and the state has created a special body, the Prosecutor's Council, to assist and discipline him. The County Commissioners, Judge and Clerk are administrators who necessarily have a more local focus, but when their duties involve the state prosecutorial function, they, too, in terms of their function, are state officers. Texas counties also have dual tasks, both local and state.

2. *Texas Counties' Local Governmental Functions and Capacity for Providing Local Self-Governance*

a. *Local Functions*

In recent years counties have provided some direct services to local citizens. *See, e.g.,* Tex.Rev.Civ.Stat.Ann. art. 2351g-2 (Vernon 1982) (provision of disposal facilities). For the most part, however, the state has either provided these services directly, Texas Legislative Council, Staff Research Report, Local Government Part I—Setting and Primary Income Sources 17, 20 (1951), authorized the county to enter contracts with other entities to perform these services, Tex.Rev.Civ.Stat.Ann. art. 2351a, § 2, (Vernon 1982), or created "special districts" to perform services in areas such as public health, education, welfare and flood control. Texas Legislative Council at 17, 20. Special districts are created to fill a particular need and often exercise authority over an area that includes parts of more than one county. *Laje v. Thomason,* 665 F.2d 724 (5th Cir. 1982).

b. *Capacity for Self-Governance*

A county is described in the Texas statutes as "a body corporate and politic," Tex.Rev.Civ.Stat.Ann. art. 1572

(Vernon 1982 Supp.), but it can be distinguished from a "Municipal Corporation" even though counties are discussed in Article II of the Texas Constitution entitled "Municipal Corporations." Cities are created primarily for the benefit of their citizens, while counties are primarily the local "arms" or agents of the state. *Heigel v. Wichita County*, 84 Tex. 392, 19 S.W. 562 (Tex.1892); *City of Galveston v. Posnainsky*, 62 Tex. 118 (Tex.1886). This difference was highlighted in *City of Sherman v. Shobe*, 94 Tex. 129, 58 S.W. 949 (Tex.1900), which held that counties were not subject to garnishment:

> Counties are commonly designated quasi-corporations for the reason that, being but political subdivisions of the state, and organized purely for the purposes of government, they differ essentially not only from private corporations but also from such public corporations as towns and cities, which are voluntary, and are established largely for the private interests of their inhabitants. *City of Galveston v. Posnainsky*, 62 Tex. 118. Our statutes, it is true, expressly declare that "each county . . . shall be a body corporate and politic." This merely confers upon the counties corporate powers for the more effectual performance of the functions for which they were created, and clearly was not intended to place them upon the footing of private corporations or of other municipalities. *Id.* 58 S.W. at 949-50.

The difference between counties and cities discussed in the early decisions remains. The primary responsibility of counties is to carry out state functions, while cities provide local services such as police and fire protection. An important difference between the two types of governmental units is that counties have no power to enact ordinances, but under their charters, cities of more than 5,000 inhabitants have this power. Tex.Const. art. 11, § 5,

Tex.Rev.Civ.Stat.Ann. art. 1175, § 34 (Vernon 1982). The broad nature of cities' capacity to provide local self-goverance is demonstrated by the opening language of the statute which enumerates some of the powers of home rule cities: "Cities adopting the charter or amendment hereunder shall have full power of self-government." *Id.* Cities generally have greater discretion than do counties in carrying out certain functions. For example, they can engage agents or employees on any terms of payment acceptable to both parties. *Taxpayers Ass'n of Harris Co. v. Houston,* 100 S.W.2d 1066, (Tex.Civ.App.—Galveston, 1936), *aff'd* 129 Tex. 627, 105 S.W.2d 655; *State ex rel. Boree v. Catlin,* 84 Tex. 48, 19 S.W. 302 (Tex.1892).

The limited constitutional and statutory powers given to counties are generally interpreted more narrowly than those of cities. *Tri City Fresh Water Supply Dist. No. 2 of Harris County v. Mann,* 135 Tex. 280, 142 S.W.2d 945 (Tex.1940). This "double standard" was pointed out in *Stratton v. Commissioners Court,* 137 S.W. 1170 (Tex.Civ. App.—San Antonio 1911, writ ref'd n.r.e.), in which the court, after a close examination of the revelant statutes, determined that a county had the power to impose a tax for the construction of a county courthouse:

> A distinction is usually made between municipal corporations, such as incorporated cities, and quasi-corporations such as counties and townships. The powers of such governmental agencies are generally more strictly construed than those of municipal corporations. *Id.* at 1177.

On the other hand, counties do enjoy a measure of fiscal independence, having the power to levy taxes for "county purposes." Such revenues are maintained in a separate county treasury. Tex.Const. art. 8, § 9.

In sum, county government provides relatively few direct services to citizens. In addition, their capacity to respond to local needs and desires is limited and those powers are narrowly construed by the courts.

3. *Texas Counties as Administrative Arms of the State*

Texas counties perform a number of functions for the state including the supervision of state elections, the collection of state property taxes, the construction of state roads, bridges and ferries, and the administration of justice. The Texas Supreme Court has emphasized that when counties act in certain capacities they are agents of the state. *Childress County v. State,* 127 Tex. 343, 92 S.W.2d 1011 (Tex.1936); *Bexar County v. Linden,* 110 Tex. 339, 220 S.W. 761 (Tex.1920). In *Childress County,* the state granted the county property for educational purposes which the county had sold to private parties and later retrieved when the private parties failed to make required payments. The state had acquired a tax lien against the property while it was in the hands of the private parties and attempted to assert it against the county. The court declared the tax lien invalid because it viewed the county as an arm of the state which carries out state functions:

> The land involved is agricultural school land. . . . [State law] expressly provides that such land may be taxed as privately owned lands, except that it may not be taxed for state purposes. The county is merely an arm of the state. It is a political subdivision thereof. In view of the relation of a county to the state, the state may use, and frequently does use, a county as its agent in the discharge of the State's functions and duties. [citations omitted]. The state has appropriated and dedicated to counties, for public school purposes, a part of its public domain. The title thereto

> is vested in the counties. . . . This is for the benefit of the counties. When the title to this land reverted to Childress county, it also, in a certain sense, reverted to the state. . . . *Id.* 92 S.W.2d at 1015-16.

[1] When the county acts as an administrative body carrying out important state functions, it is not surprising that the state exercises tight control over the execution of these functions. W.E. Benton, *Texas, Its Government and Politics,* 230-31 (3rd ed. 1972). Indeed, the legislature has drafted specific legislation detailing the way in which counties are to perform state functions as one means of controlling county administration of state policy. *See, e.g.,* Tex.Rev.Civ.Stat.Ann. art. 2351a-6 (Vernon 1982). In addition, the State's control over the performance of these functions has been aided by judicially placed restrictions on the county's power to carry out these functions. Unless a particular county action is explicitly authorized by the constitution or a statute, the county will not be allowed to exercise it. For example, in *Miller v. El Paso County,* 136 Tex. 370, 150 S.W.2d 1000 (Tex.1941), the court held that a statutory provision did not give the county power to impose a tax for the purpose of promoting growth and development of the county. In *Canales v. Laughlin,* 147 Tex. 169, 214 S.W.2d 451 (Tex. 1948), the court held that the county had no authority to appoint a "County Road Unit Supervisor" although it was authorized to appoint a number of other officials whose jobs related to the task of road construction and maintenance. Legislation related to counties is narrowly drafted and the courts have taken the position that the state has conferred "duties" rather than "privileges" to the counties, which are to be carried out in the manner prescribed by the state. *Orndorff v. State,* 108 S.W.2d 206 (Tex.Civ.

App.—El Paso 1937, writ ref'd n.r.e.) (county officers fall within the definition of those officers who are considered "*under* the State government"). Though the state cannot totally eliminate county discretion in exercising these state functions, F. M. Stewart and J. L. Clark, *The Constitution and Government of Texas,* 183 (4th ed. 1949); C. McClesky, *The Government and Politics of Texas,* 304 (2d ed. 1966), students of state government believe the state is moving toward even greater control over the county administration of certain state functions such as the collection of state property tax, J. C. May, S. A. McCorkle and D. Smith, *Texas Government,* 354 (8th ed. 1980), as evidenced by its creation of state supervisory bodies such as the Prosecutor's Council, Tex.Rev.Civ.Stat.Ann. art. 332d (Vernon 1982).

III. *The County's Liability*

[2] For the county to be liable in this case, the accused system must be so attributed to it as to represent the policy or custom of the county. Implicit in this attribution is that the actors responsible for it were acting for the county qua county. If their acts were not subject to county control, the absence of county policy is an *a fortiori* conclusion. *Monell v. Department of Social Services,* 436 U.S. 568, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Here, the prosecutorial activities were undertaken to meet a state-created duty and were not subject to control by the county. Given the historical duality of county function, categorization of a state or county activity is best viewed in functional terms. The Texas Supreme Court emphasized in *Bexar County v. Linden,* 110 Tex. 339, 220 S.W. 761 (1920):

> A principal State function which [counties] perform, in whose performance they exercise essentially State powers, is the administration of the State's justice. Their local courts exist for no other purpose. Their local constabulary is to keep the State's peace. They represent the State's power in the different duties with which they are charged, and in the execution of those duties they exercise the State's power for the common welfare . . .

At all times, the individual defendants here, the Criminal District Attorney, the County Clerk and the County Criminal Judges, were functioning as state not county officers. They were enforcing the state criminal law. The complaint, in fact, was issued in the name of the state. In other words, there is no county criminal law to enforce.

> [I]t does not follow that because an officer is called a "county officer" the functions he exercises are exercised for the (county). They may be state officers though their jurisdiction or powers may be confined to the limits of the county . . .

Connor v. Zackry, 54 Tex.Civ.App. 188, 117 S.W. 177 (1909) (quoting *Jernigan v. Finley,* 90 Tex. 205, 38 S.W. 24, 25 (1896). As noted, the reality is that the county had no control over these individual defendants, whose acts, the plaintiffs argue, "may fairly be said to represent official [county] policy." 436 U.S. at 694, 98 S.Ct. at 2037. Of course, a citizen or the county is authorized to bring a complaint against the County Clerk or judges, but even so only a state court can suspend or remove them. Tex.Rev. Civ.Stat.Ann. art. 5970-5989. Indeed, the District Attorney can only be suspended or removed after investigation and complaint by the state Prosecutor's Council and a subsequent trial in state court. Tex.Rev.Civ.Stat.Ann. art. 332d.

The court's conclusion in *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980), that a county judge executing his discretionary authority under a state statute was in effect a state rather than a county officer and that the county would not be liable under § 1983 for his actions, strongly suggests that the County Clerk, county judges and District Attorney in this case were exercising state rather than county policy. The court there adopted a functional analysis inquiry into whether when the acts at issue were done the official was wearing his county or state badge. The court explained:

> Because of the unique structure of county government in *Texas,* the [county] judge—like other elected county officials, such as the sheriff and treasurer—holds virtually absolute sway over the particular task or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein. [citation omitted]. Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983. [citations omitted]. The narrow authority delegated to the county judge in [Tex.Educ.Code Ann. § 4.28 (Vernon 1972) to compel disclosure of the names of those sponsoring a boycott of the schools] bears no relation to his traditional role in the administration of county government or to the discretionary powers delegated to him by state statute in aid of that role. Instead, his duty in implementing section 4.28, much like that of a county sheriff in enforcing a state law, may more fairly be characterized as the effectuation of the policy of the State of Texas embodied in that statute for which the citizens of a particular county should not bear singular responsibility.

619 F.2d at 404.

It necessarily follows, given the teaching of *Monell,* that Dallas County is not liable for damages under section 1983 because the accused practices were implemented by state officers, not county officers. The acts were neither done for the county nor subject to its control. The accused practices can then hardly be said to be a county custom or practice.

B. *The Eleventh Amendment Issue*

The county has presented a strong argument that in administering the prosecutorial function it is protected by the eleventh amendment as an arm of the state. Without deciding that issue, I note that the fifth circuit has suggested whether a county is a "person" under *Monell,* because implementing county policy, and whether the county is immune as an arm of the state are "dependent upon the same reasoning." *See Van Ooteghem v. Gray,* 654 F.2d 304 (5th Cir. 1981). In *United Carolina Bank v. Board of Regents,* 665 F.2d 553 (5th Cir. 1982), the court focused on (1) state law defining the entity and (2) state control over the entity in finding a university immune under the eleventh amendment. The third inquiry by the *United Carolina* court, the entity's lack of fiscal autonomy, might pose a problem on the facts before this court. Nonetheless, the state does pay fees for services rendered by the officials in conducting criminal prosecutions and the county is subject to state auditing and reporting requirements. Furthermore, the *United Carolina* court suggested that the eleventh amendment is not only applicable when payment of a judgment would be directly out of the state treasury but also when payment would "interfere" with the state's fiscal autonomy. While the argument for

eleventh amendment immunity for counties is strong, I do not, because I need not, reach it here. It bears emphasis that the eleventh amendment would bar only suits in federal court. I have, in refusing injunctive relief, expressed my reluctance to intrude into state functions. The rush to by-pass the state courts so much in vogue is neither necessary nor beneficial to either federal or state courts. More to the point, the eleventh amendment represents an expression of federalism aimed directly at overturning a decision of the federal courts. That strong preference for state courts in suits for money damages against states ought not be forgotten in its interpretation.

IV. *The Liability of the Criminal District Attorney*

[3] The jury found Henry Wade, Dallas County's Criminal District Attorney, liable for not advising the county to change its system for issuing misdemeanor capias. A review of the Texas authority on the relationship between the county and the Criminal District Attorney indicates Wade could not be held liable for failing to advise the county on this question. The primary task of a Criminal District Attorney is to represent the State in criminal and civil matters. He is almost wholly "a judicial officer of the state and has very little to do with the administration of the county." H. G. James at 42.

The obligation of the Criminal District Attorney is expressly stated by statute:

> The district and county attorneys, upon request, shall give an opinion or advice in writing to any county or precinct officer of their district or county, touching their official duties.

Tex.Rev.Civ.Stat.Ann. art. 334 (Vernon 1982).

There is no evidence that any Dallas County official submitted a request, written or otherwise, asking Wade's advice concerning the county's system for issuing misdemeanor capias. Article 334 does not impose a duty on a criminal district attorney to provide unsolicited legal advice to a county.

It might also be argued that Henry Wade was required to give the advice in question because the Criminal District Attorney is required to represent county officials and employees in suits involving acts they performed as part of their public duties. *Id.* art. 332c. There is a great deal of difference, however, between an obligation to represent a county official who has been sued in relation to his public duties and an obligation to monitor independently the manner in which those officials carry out their public duties.

The Texas courts have emphasized that the Criminal District Attorney has a limited responsibility to the county. He is not required "to represent the county in its general legal business or the conduct of ordinary civil actions." *Hill Farm, Inc. v. Hill County,* 425 S.W.2d 414, 417 (Tex. Civ.App. — Waco, 1968), *aff'd on other grounds,* 436 S.W.2d 320 (Tex.1969).

Although he is locally elected, Tex.Const.art. 5, § 21, he is primarily responsible to the state. His bond is payable to the governor, Tex.Stat.Ann. art. 326k-1 (Vernon 1982), and he is disciplined and advised by a centralized agency of the judicial department of state government, the Prosecutor's Council. *Id.* at 332d.

The state legislature has defined the duty of the District Attorney to render legal advice. There being no

evidence that he breached that duty, he cannot be held liable.[3]

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[3]Insofar as the actual preparation and filing of the complaint here, Wade enjoyed immunity as a prosecutor. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Stephen C. CRANE, et al., Plaintiffs,

v.

The STATE OF TEXAS, et al., Defendants.

CIVIL ACTION NO. CA-3-80-0978-G

JUDGMENT

1. This court declares the rights and liabilities of the parties to be those expressed in its Memorandum Order of November 30, 1981 and its Order of February 4, 1982.

2. Pursuant to the jury verdict of December 21, 1981 and the court's Memorandum Opinion of March 11, 1982, it is ordered and adjudged that plaintiff, Stephen C. Crane, take nothing as damages from any of the defendants.

3. Pursuant to the court's Memorandum Order of September 5, 1982 and its Memorandum Opinion of July 26, 1983, it is ordered and adjudged that plaintiff recover from the State of Texas his taxable costs and the sum of $62,150.00 as attorneys' fees ($42,975.00 to Douglas Larson and $19,175.00 for Peter Lesser) plus interest at the legal rate from the date of this judgment.

Dated at Dallas, Texas, this 16th day of August, 1983.

Patrick E. Higginbotham

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Stephen C. CRANE, et al.,
Plaintiffs,

v.

The STATE OF TEXAS, et al.,
Defendants.

CIVIL ACTION NO.

CA-3-80-0978-G

MEMORANDUM ORDER

The court has jurisdiction under 28 U.S.C. § 1443 of this civil rights action asserting claims under 42 U.S.C. § 1983, *et seq.* The plaintiff class members[1] were arrested pursuant to misdemeanor capias issued in Dallas County[2].

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[1]In an Order, dated April 30, 1981, the court certified the suit as "a class action on behalf of all persons who have been, or will be, arrested for misdemeanor offenses pursuant to capias for committing offenses over which the County Criminal Courts have jurisdiction." Memorandum Order, pages 8-9.

[2]While a capias is not a "warrant of arrest" as defined in Tex. Code Crim. Proc. Ann. art. 15.01 (Vernon), it is a writ that commands a Texas peace officer to arrest a person accused of an offense. Tex. Code Crim. Proc. Ann. art. 23.01. The terms "warrant" and "capias" will be used interchangeably herein because for purposes of constitutional scrutiny there is no substantive difference between an arrest warrant and a capias. See *Whitely v. Warden*, 401 U.S. 560 (1971); *Knox v. State*, 586 S.W.2d 504, 508 (Tex. Crim. App. 1979). (Roberts, J, concurring).

The class challenges the legality of these arrests naming as defendants: the County of Dallas, Texas; Henry Wade, Criminal District Attorney of Dallas County; Larry Murdoch, County Clerk of Dallas County; the County Criminal Court Judges in Dallas County; and D. Woods, A. Perez and L. Buchanan, city police officers (collectively "defendants").

On April 21, 1980, Stephen C. Crane, a young lawyer, was arrested at his office and jailed pursuant to a misdemeanor capias alleging that he knowingly exhibited obscene film at the Crystal Adult Theater in Dallas. It later developed that Crane was arrested only because a lawyer with whom Crane shares office space listed him, without his knowledge or consent, as one of three "initial directors" in the 1979 Articles of Incorporation of a Texas corporation known as the Crystal Theater. The incorporation was a routine and near clerical task. There is no evidence that anyone in the law office knew the specific use to be made of the client's new corporation. The charges against Crane were dismissed for insufficient evidence on the state's motion.

Crane charges that his arrest was illegal and was a direct and anticipatable by-product of an illegal system of misdemeanor arrests. More specifically, Crane complains that Dallas County regularly issues capias in misdemeanor cases without a finding of probable cause by a neutral and detached magistrate, in violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and Article 23.04, Tex. Code Crim. Proc. Ann (Vernon).[3]

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[3]Article 23.04 provides that "[i]n misdemeanor cases the capias or summons shall issue from a *court* having jurisdiction of the case." *Compare* Article 23.03, which provides that "A capias shall be immediately issued by the *district clerk* upon each indictment for felony presented. . . ." (emphasis supplied).

Crane charges that the clerks of the Dallas County courts automatically issue arrest warrants at the reqeust of any Assistant District Attorney armed with the usual "forms": an affidavit and information alleging commission of a misdemeanor offense. He maintains that the county clerks are not neutral magistrates within the meaning of the constitution or Article 2.09, Tex. Code Crim. Proc. Ann (Vernon),[4] that misdemeanor capias regularly issue without any finding of probable cause by a judicial officer, and that Articles 23.01[5] and 23.04 of the Texas Code of Criminal Procedure are unconstitutional, as applied, if construed to empower clerks to issue a capias merely on the filing by a district attorney of an affidavit and information which charge commission of a misdemeanor.

Crane seeks money damages for himself and prospective relief for the class in the form of a declaratory judgment, a permanent injunction and attorneys' fees. The court bifurcated trial of the legality of and relief for any illegality for the challenged practices. By this Order, the

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[4]Article 2.09 states:

> Each of the following officers is a magistrate within the meaning of this Code: The judges of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the District Court, the county judges, the judges of the county courts at law, judges of the County Criminal Courts, the justices of the peace, the mayors and recorders and the judges of the city courts of incorporated cities or towns.

[5]Article 23.01 defines a "capias" as "a writ issued by the court or clerk, and directed 'to any peace officer of the State of Texas,' commanding him to arrest a person accused of an offense. . . ." Tex. Code Crim. Proc. Ann. art. 23.01 (Vernon).

court enters findings of fact and conclusions of law following trial of the legality of the arrest procedures.

The custom and practice in Dallas County in issuing capias in misdemeanor cases is virtually undisputed and can be described as follows:

1. Twice a day a police officer brings a large number of police reports to the Dallas District Attorney's office. These reports are essentially requests to prosecute. The District Attorney prepares an information and affidavit and the officer signs the affidavit. In misdemeanor cases, the printed affidavit form is filled in with the name of the police officer who filed the report, the suspect's name, the date of the purported offense and a "description" of the offense (i.e. a quotation of the language of the statute which has allegedly been violated). There are separate forms for each of the more common misdemeanors, such as driving while intoxicated, on which the "description" is printed. The affidavit is signed by a police officer, who is seldom the same officer who filed the police report, and is witnessed by an assistant district attorney.

2. The affidavits and informations (and since July 1, 1981 an additional document labeled "probable cause affidavits"[6] are taken to the criminal processing section of the County Clerk's office by the District Attorney's office.

3. The criminal processing section of the County Clerk's office consists of five to seven assistant county clerks and is headed by Joyce Knight, an assistant county clerk. These clerks are not assigned to particular County Criminal Court Judges. They are

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[6]This "probable cause affidavit" is another form in which the police officer avers that he has probable cause to believe that the suspect committed the offense named in the information and affidavit.

neither employed by, nor supervised by, any magistrate.

4. The clerks in the criminal processing section of the County Clerks office type the information on the affidavit on a form labeled "capias".

5. By this process, approximately 800 misdemeanor capias are issued each week under the signature of one of the following: The assistant county clerks in the criminal processiong section, Knight, or L. E. Murdoch, the County Clerk.

6. Knight and the clerks she supervises have received no instruction as to the meaning of probable cause, and make no effort to review the forms for content or otherwise attempt to learn if there is probable cause to support the issue of misdemeanor capias.

7. That is, the Dallas County Criminal Court Judges and Murdoch make no probable cause determination before capias are issued for misdemeanors, and no effort to see that such a determination is made by the assistant county clerks. In sum, under the practice as it has existed through the class period, the role of county clerks is essentially ministerial.

8. These misdemeanor capias are then returned to the police department, and officers are assigned the task of executing the capias warrants.

The class travels primarily upon a claim that the arrest of individuals pursuant to a misdemeanor capias issued in Dallas County violates the Fourth Amendment. As will be seen, I conclude that read against the constitution, and the common law requirements as applied by Texas courts, Texas law forbids the accused practices. The footing of this ruling is then firmly upon state law, albeit read in its proper matrix of common law and constitutional standards.

The Texas statutory scheme authorizing capias does not by its express terms require a probable cause deter-

mination. Article 23.04 of the Texas Criminal Code provides that "[i]n misdemeanor cases the capias or summons shall issue from a *court* having jurisdiction of the case." At the same time, Article 23.03 provides that "A capias shall be immediately issued by the *district clerk* upon each indictment for *felony* presented . . . " (emphasis supplied). As will be seen, this difference between 23.03 and 23.04 makes sense when read against the common law rules, and the Texas rules, of arrests for misdemeanors and felonies and explains Article 23.01 which defines capias " . . . as a writ issued by the court or clerk," and directed to any peace officer of the State of Texas, commanding him to arrest a person accused of an offense and bring him before that court immediately . . . " The explanation is that the scheme presupposes an awareness that valid capias can issue only upon properly determined probable cause. In the case of a felony that determination is made by the grand jury in its decision to indict and it may be issued by the court clerk. With a misdemeanor capias issues not from a county clerk but from a *court* with jurisdiction over the case. I conclude then that Texas law requires that to be valid a misdemeanor capias must be issued from a court with jurisdiction over the case after a determination by a neutral magistrate of probable cause. I do not now decide whether the County Clerk, in addition to the judge to whom the case is assigned, can be that magistrate. This reading both applies the common law rules and saves the constitutionality of the Texas statutes. I will outline those rules with their interlaced constitutional parts and apply them to the accused practices.

Arrest Under a Warrant

The Fourth Amendment provides that "no warrant shall issue except on probable cause". As part of this

guarantee a warrant for arrest is to be issued only after a detached and neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443, 444-53 (1971), determines that there is probable cause[7] to issue it. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Giordenello v. U. S.*, 357 U.S. 480 (1958).

The procedure which Dallas County has followed in issuing misdemeanor capias would not meet this requirement if the state statutes were read as permitting a capias to issue without determining probable cause. Specifically, this requirement of probable cause is not met when, as is the case in Dallas County, as assistant clerk in the Criminal Processing Section of the County Clerk's office transfers (types) the information from an affidavit provided by the District Attorney to a document (capias) authorizing an arrest and signs that document in her name or the name of another clerk. There is no suggestion that in transferring the information from the affidavit to the capias that these assistant county clerks made any effort (they were not instructed to do so) to determine whether the information on the affidavit would support a finding of probable cause. Since July, 1981, the District Attorney's office has given the clerks "probable cause affidavits", but this addition to the procedure does not cure its deficiencies. These "probable cause affidavits" have not been used by any deputy county clerk to decide if there is probable cause to issue a misdemeanor capias. There is no evidence that anyone instructed the clerks in the art of probable cause determination.

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[7]Probable cause has been defined by the Supreme Court as "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) citing *Beck v. Ohio*, 374 U.S. 89, 91 (1964).

In *Shadwick v City of Tampa,* 407 U.S. 345 (1972) the Supreme Court made clear that the constitution does not require magistrates to be lawyers or judges. In fact, the warrants for violation of Tampa's city ordinances were issued by city clerks. The Court did emphasize that the Tampa clerks were assigned to particular judges, *id.* at 346, and that the clerks were capable of making probable cause determinations. *Id.* at 352. While *Shadwick* may offer hope in the remedy stage, it provides no comfort to the legality of the system for issuing misdemeanor capias warrants in Dallas County as now practiced because (1) the clerks of the County Clerk's office are not under any judicial supervision; (2) they are performing a clerical function and do not attempt to make a probable cause determination before issuing a capias, and (3) as the system is now administered they are not "independent" of the prosecutor. Consequently, in Dallas County, persons are arrested on misdemeanor capias solely because a district attorney has completed a form affidavit based on police reports and not because a "neutral magistrate" has determined, independent of the police and the prosecutor, that there is probable cause for its issuance. Article 23.04 V.A.C.C.P. requires that a capias for misdemeanor arrests be issued "from a court having jurisdiction of the case". In *Knox v. State,* 586 S.W.2d 504 (Tex. Crim. App. 1979, no writ), these provisions of the criminal code were construed, as here, against a constitutional backdrop. That court made plain that a capias writ and a warrant of arrest under V.A.C.C.P. 15.01 are "for purposes of our constitutional consideration . . . " not different, *id.* at 508. Judge Roberts' concurring opinion acknowledged the constitutional requirements of a neutral determination of probable cause by a magistrate. Having done so, he suggested that

the capias sequence could be read (and must be so read to sustain their constitutionality) as not to

> . . . authorize a clerk to issue a capias merely on the filing of a complaint and information which charge a misdemeanor offense; a neutral and detached magistrate who is competent to make the determination must determine from the complaint that there is probable cause to issue a capias for an arrest. The standard of probable cause must be the same as is required for a warrant of arrest. *Whiteley v. Warden,* 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

The prerequisites for the issue of valid capias are found in the common law requirement of probable cause and the constitutional requirement of an independent magistrate. Such were here absent. Having found in absence of valid warrants to sustain the accuse arrests, I turn to the question of when an arrest can be made without a warrant.

Warrantless Misdemeanor Arrests.

While the common law is plain, there is uncertainty as to the precise contour of the constitutional requirements for valid misdemeanor arrests without a warrant. I will not explore all such questions, because the accused practices do not fall into any of the arguably constitutional categories of warrantless misdemeanor arrests.

Before 1978, several courts refused to hold that the common law warrant requirements for misdemeanor arrests were a command of the Fourth Amendment. *Street v. Surdyka,* 492 F.2d 368, 371-3 (4th Cir. 1974); *Diamond v. Marland,* 395 F. Supp. 432, 438-440 (S.D. Ga. 1975); *U. S. v. Grosso,* 225 F. Supp. 161, 168-70 (W.D. Pa. 1964). In *U. S. v. Watson,* 423 U.S. 411 (1976), however, the Su-

preme Court relied heavily upon the common law rule of arrest in upholding the constitutionality of warrantless felony arrests in public places without a showing of exigent circumstances. *Id.* at 418-20. Under the same common law history, an arrest for a misdemeanor committed out of the presence of the arresting officer required a warrant. Not surprisingly, then, it can be argued that after *Watson,* the constitutionality of a warrantless misdemeanor arrest unless the offense was committed in the presence of the arresting officer is if not an "extremely doubtful" proposition, *Daye v. City of Albany,* 496 F. Supp. 1227, 1232 (M.D. Ga. 1980), at the least at issue.

Regardless of whether *Watson* effectively concretized the common law rules of misdemeanor arrest as Fourth Amendment doctrine, (an idea fraught with hazards), thereby compelling Texas to follow, Texas already required a warrant. *Cf. Knox v. State,* 586 S.W.2d 504 (Tex. Ct. Crim. App. 1979, no writ). Probable cause is not a sufficient basis for a warrantless misdemeanor arrest under Article 14.01 V.A.C.C.P. Of course, an arrest for a misdemeanor committed in the presence of the arresting officer is permissible under the common law and presumably so under the constitution. The law of Texas is the same. Article 14.01 V.A.C.C.P.

There are other types of warrantless arrests which may be permissible, including arrests in situations where the arrested person was breaching the peace, or might escape later apprehension if not immediately arrested. *U. S. v. Watson,* 423 U.S. 411, 422 (1976) (citing the Model Code of Pre-Arraignment Procedure § 120.1(b)(i)(ii). However, defendants have not argued and there is no evidence to suggest that the accused arrests are of such type. In sum,

under the common law as adopted in the criminal code and as interpreted by Texas courts, an arrest for a misdemeanor committed out of the presence or view of the arresting officer requires a warrant. The accused arrests are for misdemeanors committee outside the presence of the arresting officer. And as earlier discussed, the warrant procedure is defective.

Post-Arrest Probable Cause Determinations.

Defendants have argued that an opportunity for a post-arrest probable cause determination is sufficient, relying upon *Gerstein v. Pugh,* 420 U.S. 103 (1975). *Gerstein* held that two individuals arrested on felony charges upon an information filed by a prosecutor could not be subjected to "a significant restraint of liberty" prior to trial without a probable cause determination of a detached and neutral magistrate.

Gerstein has no application to the present controversy. It decided constitutional requirements for detaining persons legally arrested on felony charges and not the constitutional requirements for a valid misdemeanor arrest. *Gerstein's* focus is apparent:

> The issue in this case is whether a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for a pretrial restraint of liberty. *Id.* at 105.

Implicit in the court's analysis in *Gerstein* is the premise that review by a neutral magistrate of any probable cause to arrest for a felony committed outside an arresting officer's presence need not precede the arrest. *Gerstein* thus accepts the validity of a warrantless arrest

upon probable cause for a felony and addresses the adequacy of its post-arrest review. As earlier pointed out, however, an arrest for a misdemeanor committed out of the presence of the arresting officer may, under Texas law and perhaps under the constitution (with the narrow exceptions noted), be made only with a warrant. *Compare Gerstein* with *Shadwick v. City of Tampa,* 407 U.S. 345 (1972). *Cf. Knox v. State,* 586 S.W.2d 504 (Tex. Ct. Crim. App. 1979, no writ). I need not decide whether, as suggested in *Watson,* the common law of misdemeanor arrests is also the law of the Fourth Amendment because it was the law of Texas before *Watson,* and continues to be. A valid arrest under Florida law was implicit in *Gerstein.* The arrests here were illegal under Texas law, and I do not reach the question of the sufficiency of state procedure to justify continued restrain following a valid warrantless arrest.

Conclusion.

The present practice of arresting people with capias issued in the manner I have described is illegal under Texas law. A determination by a neutral magistrate must precede the issue of a valid capias.

I recognize the crushing flow of paper that now exists and remain sensitive to the vital need to have a system that achieves the twin, but sometimes Janus faced goals of efficient law enforcement and the right of innocent citizens to be let alone. I am not convinced such a clash is here inevitable. No one in this story set out to flaunt the law. The system has evolved with a law enforcement and court system that has shared the rapid growth of its community. Good intentions and understandable explanations

there are. But what happened to young Stephen Crane reminds us in palpable terms that the rule of law must be more than a bromidic abstraction. The eroding bite into human dignity of a mindless flow of government paper ought always to be guarded. It can, as Stephen Crane can attest, become so independent of intended purpose as to jerk innocent citizens from their offices and homes. If not earlier detected, we must at least then interpose the citizen's mind; the hoary rule of probable cause long the law of this state will do that. How the system is brought into compliance will be the subject of the remedy stage. This court will conduct further hearings on the equitable and monetary relief needed to remedy these violations. I want to make one final point lest some be misled. I have confidence in the ability and integrity of the judges of the criminal courts of Dallas County and the District Attorney, as well as the good faith of all the named defendants. I look to them for concrete proposals for a system they, not I, will administer. I have no intention of superintending state functions directly or through the guise of continuing jurisdiction. I have no more insight, and less experience with the system, than they do. The only difference between me and them is that the law, which we are all sworn to uphold, both grants jurisdiction to this court and imposes upon me a duty to decide.

The plaintiff class will submit within 30 days a proposed decree. Defendants will reply 15 days thereafter.

PATRICK E. HIGGINBOTHAM
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Stephen C. CRANE, et al., Plaintiffs,

v.

The STATE OF TEXAS, et al., Defendants.

CIVIL ACTION NO. CA-3-80-0978-G

ORDER

Pending before this court are a plurality of motions including requested injunctive relief. This Order will decide only the request for injunctive relief.

For four related and sometimes overlapping reasons, the request for injunctive relief is DENIED.

First, beginning as early as June 1981, some five months before this court's Memorandum Order of November 30, 1981, defendants voluntarily changed the method used to issue capias in misdemeanor cases. Implementation of this change has proceeded at a steady pace. At all times, defendants have demonstrated by concrete action their good faith effort to achieve a sound and legally sufficient system.

Second, prosecution of criminal offenses is a core function of state sovereignty. Basic concepts of comity and sensitivity to our devotion to federalism require that no injunctive relief be entered beyond that absolutely necessary. Despite the increased use of the injunctive decree by federal courts, the monitoring function associated with it carries a high risk of deep intrusion into state

function. In other words, an application for injunctive relief that would cast the continuing duty upon this court to monitor sovereign state functions comes burdened with a strong presumption against it.

Third, despite its common and long time usage, no one has yet articulated the conceptual underpinnings of capias or obtained a certain fix upon its place in the constellation of Fourth Amendment jurisprudence. Whether one believes this court's Opinion of November 30, 1981 is sound or whether they believe it unsound, the manner of issuing capias in Dallas County was on uncertain legal ground. That uncertainty has motivated the defendants to move, wisely I think, to a system that is both efficient and footed on firm legal ground.[1] In doing so, they make no conces-

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[1]I will return to the subject of the uncertainty of the law when the remaining questions are decided. I pause now only to emphasize that the Texas courts are the supreme arbiters of Texas law and they have not explicitly defined the role of capias. Their construction of the capias statutes could alter certain of the premises of this court's earlier opinion. Even if the statutes are read as contemplating a determination of probable cause after arrest (this determination provides no answer to the failure to comply with even the defendants' interpretation of the statutes) the constitutionality of the accused practices would still turn on an answer to the question not yet decided by the Supreme Court of whether the Fourth Amendment prohibits warrantless misdemeanor arrests for offenses committed out of the presence of an arresting officer. Finally, even if capias as contemplated by the Texas Code of Criminal Procedure meets constitutional muster, compliance would require (1) that capias issue from and under the authority of the court, not the county clerk; and (2) an arrested person be brought to that court instanter. Given the volume of misdemeanor capias, the administrative difficulties posed by retention of capias may be greater than with warrants.

As this case continues to unfold, this court will continue to review its earlier opinion to ensure that it decides no more than is necessary. It can be argued that it ought to be narrowed

(Continued on the following page)

sion that the system was, in fact, illegal. They recognized only that there were and are serious legal questions as to its legality. They now utilize warrants of arrest in a manner calculated to ensure that they issue only upon probable cause found by a neutral magistrate. That decision makes sense because it makes little sense to take legal risks given the number of warrants being processed. And this move to solid legal ground places the defendants in a sound position regardless of the ultimate outcome of this case.

Fourth, the court finds little risk that defendants will not, in their own self-interest, hereafter administer their warrant system in a lawful manner. That is, the class has not shown a threat of future illegal conduct such as to warrant the granting of injunctive relief. For such problems as will inevitably develop in individual cases, the state courts remain open and well capable of responding.

The remaining questions, including the post-verdict attacks upon Crane's individual case, will be decided in due course.

PATRICK E. HIGGINBOTHAM
United States District Judge

(Continued on following page)

for two reasons. First, because it has become plain that Crane's arrest was illegal even if Texas law contemplated and the Fourth Amendment allows a post-arrest determination of probable cause, both because no probable cause to arrest Crane existed regardless when it was determined and because his arrest was illegal in that capias was issued by a clerk and not a court. In addition, it was not the practice to take persons instanter to the court in which the case was pending. Crane was not. Second, the claim of the class for injunctive relief is being denied because defendants, for reasons of administrative prudence, have moved to a different system. At the same time, it may become apparent that the issue of who, if anyone, is liable to Crane for his money damages puts the system at issue. I do not decide this question. I mention it to emphasize that it is the final judgment in this case that will finally speak for this court.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Stephen C. CRANE, et al., Plaintiffs,

v.

The STATE OF TEXAS, et al., Defendants.

CIVIL ACTION NO. CA-3-80-0978-G

MEMORANDUM ORDER

Before the court is plaintiff's motion for attorneys' fees. The court decides that plaintiff is a "prevailing party" and is entitled to attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988.

After his arrest in April 1980, Stephen Crane filed suit challenging Dallas County's method of issuing capias in misdemeanor cases without a finding of probable cause by a neutral and detached magistrate. By order of November 30, 1981, this court held that this practice was "illegal under Texas law." By virtue of that holding, Crane is a prevailing party. He has vindicated important rights, *see Miller v. Carson,* 628 F.2d 346, 348 (5th Cir. 1980), and is entitled to a declaratory judgment that the system for issuing capias was illegal.

Moreover, though Dallas County changed its system for reasons including "administrative prudence," *see Crane v. State,* No. 80-0978 (N.D. Tex. Feb. 4, 1982), it is clear that Crane's suit challenging the system was a catalyst in

effectuating that change. When there is more than one cause for defendants' change in conduct, the plaintiff is a prevailing party if its suit is a material factor in bringing about defendants' action. *Morrison v. Ayoob,* 627 F.2d 669 (3rd Cir. 1980). *See also Williams v. Leatherbury,* 672 F.2d 549, 551 (5th Cir. 1982) (plaintiff is prevailing party if suite is a substantial factor or a significant catalyst in motivating defendants to end unconstitutional behavior); *Coen v. Harrison Cty. Sch. Bd.,* 638 F.2d 24, 26 (5th Cir. 1981) (plaintiff is prevailing party if suit is a major factor in bringing about success); *Williams v. Miller,* 620 F.2d 199 (8th Cir. 1980) (plaintiff is a prevailing party when its suit is a catalyst causing voluntary compliance by defendant). Therefore, though the court denied injunctive relief after defendant changed its system and further determined that the Criminal District Attorney and the County Clerk were acting as state officials when issuing and enforcing capias so that the defendant Dallas County was not liable for damages, *see Crane v. State,* No. 80-0978 (N.D. Tex. Mar. 11, 1982), Crane prevailed on his claim for the above reasons.

Plaintiff requests attorneys' fees for Doug Larson of $150 per hour for 322.4 hours for a total of $48,360.00 and fees for Peter Lesser of $125 per hour for 180.5 hours for a total of $22,582.50. The court finds these fees reasonable and supported by the evidence at hearing. The court has reviewed the detailed affidavits and finds the time recorded to be reasonable. The case was novel and difficult and required a high degree of skill. The work demanded precluded the attorneys from working on other cases. In fact, this case and two others consumed a substantial part of their time for a year. Their ability to recover was con-

tingent upon prevailing. Crane, an attorney himself, demanded careful attention to detail from his attorneys. For these reasons the court awards $70,842.50 in attorneys' fees. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

For the reasons expressed in the opinion, this award is against the State of Texas. The actors whose conduct was at issue in the maintenance of the warrant system and its specific application to Crane were wearing their state hats. It follows that the award ought to come from the state's pocket. *See Hutto v. Finney*, 437 U.S. 678 (1978).

PATRICK E. HIGGINBOTHAM
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Stephen C. CRANE, et al., Plaintiffs,

v.

The STATE OF TEXAS, et al., Defendants.

CIVIL ACTION NO. CA-3-80-0978-G

MEMORANDUM OPINION

On September 5, 1982, this court ruled that Stephen Crane is a "prevailing party" and awarded $70,842.50 in attorneys' fees against the State of Texas. The State objected to this award, arguing that it should instead be paid by Dallas County. The court noted that the State's concerns were "not insubstantial" and requested further briefing and oral argument on this issue. Because the State does not dispute the earlier holding that Crane was a prevailing party and is entitled to recover a fee under 42 U.S.C. § 1988, the issue now before this court is whether the attorneys' fees may be awarded against the State. Finding no justification here for denying Crane his attorneys' fees, the court holds the State liable for the fee award. Nevertheless, it also reduces slightly the amount originally awarded after considering guidelines recently articulated by the Supreme Court in *Hensley v. Eckerhart,* 103 S.Ct. 1933 (1983).

Liability for Attorneys' Fees

The State first argues that Dallas County is the "proper governmental agenc[y]" to pay the fee award

because the wrongful conduct here was that of the County. The court disagrees. On March 11, 1982, the court held that Dallas County was not liable for § 1983 damages because the accused practices were implemented by officers wearing their state badges and thus did not constitute official county policy under *Monell v. Department of Social Services,* 436 U.S. 568 (1978). Since the County is not liable for damages, it follows that it also is not liable for Crane's fees and costs. *See Familias Unidas v. Briscoe,* 619 F.2d 391, 406 (5th Cir. 1980). Similarly, neither the District Attorney nor the County Clerk is liable for attorneys' fees since neither can be held liable for damages to Crane. Indeed, an award of attorneys' fees against the County, the District Attorney, or the County Clerk "would turn the meaning of 'prevailing party' on its head." *Dean v. Gladney,* 621 F.2d 1331, 1338 (5th Cir. 1980), *cert. denied,* 450 U.S. 983 (1981).

The court thus must determine whether there exist "special circumstances" that would render a § 1988 award against the State of Texas unjust. *See Morrow v. Dillard,* 580 F.2d 1284, 1300 (5th Cir. 1980). The State concedes that the eleventh amendment is no longer a bar to an award of attorneys' fees against a state government unit. *Hutto v. Finney,* 437 U.S. 678 (1978). Nevertheless, the State advances four reasons why it should not be held liable for a fee award.

First, it claims that fees cannot be awarded against a prevailing party and that it prevailed both when it successfully moved for dismissal as a named defendant and when it intervened to successfully defend the constitutionality of articles 23.01 and 23.04 of the Texas Code of Criminal Procedure. While it is true that the State was successful

in these two matters, the court holds that the State was not a prevailing party. As noted in the September 8 Order, Crane was a prevailing party because he both successfully challenged the method of issuing capias in misdemeanor cases and acted as a "significant catalyst" in motivating the defendants to change the system. These two factors that make Crane a prevailing party also defeat the State's suggestion that it was a prevailing party. As the court has previously held, the responsible officials were acting as State officials when issuing and enforcing capias. Moreover, they were exercising state policy when they voluntarily changed the method used to issue capias in misdemeanor cases. Because the conduct that made Crane a prevailing party was undertaken by the individual defendants in their capacity as State officers, the State of Texas must pay his attorneys' fee award.

The State's second argument is that the characterization of the defendants as State officers "for purposes of the Eleventh Amendment analysis" does not mean that the state should pay attorneys' fees because the accused practice here was "local" rather than "state-wide." This argument is without merit. Labeling the practice as "local" or "state-wide" begs the question of who was responsible for it and therefore liable for attorneys' fees. As this court has held, the defendants' prosecutorial activities were undertaken to administer the State's justice system and were not subject to County control. Because the officials were functioning as State officers, the State ought to pay the fee award. Even if it is true, as the State claims, that this practice was unique to Dallas County, the State has pointed to no case that has regarded the geographic limitation of a state officer's conduct as a "special circumstance" warranting relief from a fee award. *Familias Unidas* makes no suggestion to the contrary.

The State's third argument is that an award of fees against it would violate due process because the award is based on actions that the State did not defend in the lawsuit. This argument also is without merit. While it is true that the attorney general did not defend the method of issuing capias, the State's interests were adequately represented during the litigation of this issue by the district attorney's representation of defendants Wade and Murdoch.[1] As this court noted earlier:

> The primary taks of a Criminal District Attorney is to represent the state in criminal and civil matters. He is almost wholly "a judicial officer of the state and has very little to do with the administration of the county." H.G. James and I. Stewart, *County Government in Texas* 42 (2d ed. 1975) . . . . It is not . . . one of the prescribed legal duties of the county or criminal district attorney "to represent the county in its general legal business or the conduct of ordinary civil actions." *Hill Farm, Inc. v. Hill County,* 425 S.W.2d 414, 417 (Tex. Civ. App. - Waco, 1968), *aff'd on other grounds,* 436 S.W.2d 320 (Tex. 1969).

Crane v. State of Texas, 534 F. Supp. 1237, 1241 (N.D. Tex. 1982). If a public entity may be held liable for § 1988 attorneys' fees even though it is not named as defendant in the suit, *see Barrett v. Thomas,* 649 F.2d 1193, 1201 (5th Cir. 1981), it follows that the State can be held liable here when it was named as a defendant, intervened in the lawsuit, received adequate representation on other issues from the district attorney, and was given an opportunity to object to the Order of September 8.

Finally, the State argues that it cannot be held liable for attorneys' fees because of Tex. Rev. Civ. Stat. Ann. art.

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[1]As such, the State's argument that "the Attorney General *could not* defend such Defendants under state law" is irrelevant.

6252-26, which provides that the State is liable for attorneys' fees "adjudged against officers or employees of any agency, institution, or department of the state" only if certain conditions have been met. The problem with this argument is that it runs afoul of the Supremacy Clause to the United States Constitution, U.S. Const., art. 6, cl. 2. The purpose of the Civil Rights Attorneys' Fee Awards Act, 42 U.S.C. § 1988, is to "ensure that plaintiffs with meritorious 'fundamental civil rights cases,' which further an important public interest but do not result in an award of damages from which attorney's fees can be paid, are not discouraged from bringing suit because of the prospect of having to pay their own attorney's fees." *Martin v. Hancock,* 466 F. Supp. 454, 456 (D. Minn. 1979). Applying the Texas statute here to bar Crane's recovery of attorneys' fees would frustrate the policy expressed by § 1988. Because the state thus has identified no "special circumstances" warranting denial of an award of attorneys' fees, the court holds the State of Texas liable for the fee award.

Amount of Attorneys' Fees

Having determined that the State is liable for Crane's attorneys' fees, the court must now decide whether the amount originally awarded is affected by guidelines recently articulated by the Supreme Court in *Hensley v. Eckerhart,* 103 S.Ct. 1933 (1983). In *Hensley,* the Court held that a district court must address two questions in determining the amount a partially prevailing plaintiff, like Crane, may recover: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.* at 1940

While noting that the district court there had properly resolved the first inquiry in favor of the plaintiffs, the Court vacated the fee award "because the District Court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award." *Id.* at 1942 (footnote omitted). More specifically,

> [t]he court's finding that "the [significant] extent of the relief clearly justifies the award of a reasonable attorney's fee" does not answer the question of what is "reasonable" in light of that level of success. We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.

Id. (footnote omitted).

The first question posed by *Hensley* is not relevant here because Crane did not present "distinctly different claims for relief that the based on different facts and legal theories." *Id.* at 1940. The second question, however, must be considered. As previously noted, Crane successfully challenged Dallas County's method of issuing capias in misdemeanor cases. His suit also was a significant catalyst in motivating the defendants to change the system. The problem in this case, however, is that both the finding of liability and the County's decision to change the system occurred *before* Crane's attorneys expended approximately 130 hours, or 25 percent of their total time, in an unsuccessful effort to obtain money damages. In this sense, Crane's success was achieved independently of the attorney's efforts to recover money damages. Yet, this expenditure of attorney time was not wholly unjustified. While this court ultimately denied recovery, the jury's

award of damages against the County and the Criminal District Attorney both vindicated Crane and by its demonstration of its consequences reinforced the resolve to move to solid ground—a factor that in turn persuaded this court to eschew injunctive relief. Because the relief ultimately obtained justified *some* expenditure of trial time, the court will reduce the total number of hours claimed by Crane's attorney by 15%. Yet, a reduction of 15% from another figure that was in fact an expression of opinion itself gives to this judgment a mechanical quality that is unintended. Looking at the case as a whole, considering the claims that failed and those that succeeded and their intertwined nature, this fee award expresses the court's judgment as to the proper compensation for the success that was achieved.

Doug Larson's 322.4 total hours therefore must be reduced by 48.4 hours and Peter Lesser's 180.5 total hours must be reduced by 27.1 hours. At the same time, the court grants Crane's motion to supplement Larson's fee award for the 12.5 hours spent responding to the State's objections to the Order of September 8. *See Johnson v. State of Mississippi*, 606 F.2d 635, 638 (5th Cir. 1979). The court thus awards fees for Doug Larson of $150 per hour for 286.5 hours for a total of $42,975.00 and fees for Peter Lesser of $125 per hour for 153.4 hours for a total of $19,175.00.

PATRICK E. HIGGENBOTHAM

Patrick E. Higgenbotham

APPENDIX 1

Defendant: CRANE, Stephen Clarkson wm/8-7-52
Charge: Obsenity
Address: 2727 Cumberland Dr.
Location: At Large
Filling Agency: DPD
Date Filed 4-16-80
Court: CCC
Complaint: A Perez MA8023927
C/C———————————————

INFORMATION

In the Name and by the Authority of the State of Texas.

NOW COMES THE CRIMINAL DISTRICT ATTORNEY of Dallas County, State of Texas, and presents in and to the County Criminal Court ..... of Dallas County, State aforesaid, that one

STEPHEN CLARKSON CRANE

hereinafter styled Defendant, heretofore, on or about the 3rd day of April A.D., 1980 in the County of Dallas and State of Texas, did unlawfully then and there knowingly promote, to-wit: exhibit, obscene material, to-wit: one untitled 8mm film, to A. Perez, knowing the character and content of said obscene material, to-wit: depictions of sexual intercourse and deviate sexual intercourse between human beings,

Against the peace and dignity of the state.

.....
Criminal District Attorney of
Dallas, County, Texas

APPENDIX J

Form No. 73 Rev.

CAPIAS

STATE OF TEXAS

vs.

STEPHEN CLARKSON CRANE

County Criminal Court ——————————
Dallas, County, Texas

Arrest Status: At Large

Race: W

Sex M

DOB: 8-7-52

Res: 2727 Cumberland Dr.

TO ANY SHERIFF OR ANY CONSTABLE OF THE STATE OF TEXAS — GREETINGS:

YOU ARE HEREBY COMMANDED to take the body of the defendant in the above styled and numbered cause, and him safely keep so that you have him before the County Criminal Court —————————— of Dallas County, Texas, at the Courthouse of said county; instanter, then and there to answer THE STATE OF TEXAS in a charge herein filed by complaint and information, filed the —— day of April 16, 1980, A.D. 19—, wherein the said defendant is charged with the offense of

did unlawfully and knowing the content of the material did commercially exhibit an obscene motion picture as charged in the information

WITNESS MY HAND and Seal of said Court in attestation hereof on this ———————— day of April 16, 1980, A.D. 19—.

L. E. MURDOCH
Clerk, County Criminal Court
Dallas, County, Texas

By: ————————, Deputy

FEES

Arrest	$4.00
Commitment	$2.00
Release	$2.00
Approve Bond	$4.00
Other	
TOTAL	$8.00

SHERIFF'S RETURN

Came to hand the 16th day of April, A.D., 1980, and executed the 21st day of April, A.D. 1980, by arresting the above named defendant and .....

.....

.....

CARL THOMAS
Sheriff, Dallas County, Texas

By: ————————, Deputy

APPENDIX K

CODE OF CRIMINAL PROCEDURE

Art. 15.17. Duties of arresting officer and magistrate

(a) In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law.

(b) When a deaf accused is taken before a magistrate under Article 14.06 or 15.17 of this Code, an interpreter appointed by the magistrate qualified and sworn as provided in Article 38.31 of this Code shall interpret the warning required by those articles in a language that the accused can understand, including but not limited to sign language.

Article 16.01. [245] [292] [280] Examining trial

When the accused has been brought before a magistrate for an examining trial that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel. In a proper case, the magistrate may appoint counsel to represent an accused in such examining trial only, to be compensated as otherwise provided in this Code. The accused in any felony case shall have the right to an examining trial before indictment in the county having jurisdiction of the offense, whether he be in custody or on bail, at which time the magistrate at the hearing shall determine the amount or sufficiency of bail, if a bailable case.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

APPENDIX L

The Attorney General
of Texas
Austin, Texas 78711

John L. Hill
Attorney General

July 31, 1975

The Honorable Jack E. Benson
Tarrant County Auditor
Tarrant County Courthouse
Fort Worth, Texas 76102

Opinion No. H-656

Re: Whether a criminal district attorney may be granted a salary increase in mid-year without following the grievance procedure of article 3912k, V.T.C.S.

Dear Mr. Benson:

You have requested our opinion regarding whether a criminal district attorney may be granted a salary increase in mid-year without following the grievance procedure of article 3912k, V.T.C.S.

Section 2(a) of article 3912k provides:

> The salaries, expenses, and other allowances of elected county and precinct officers shall be set each year during the regular budget hearing and adoption proceedings on giving notice as provided by this Act.

In Attorney General Opinion H-11 (1973), we construed this section to mean that the salaries of elected county and precinct officials, having once been set at a regular budget hearing, may not be increased during that fiscal year. Thus, if a criminal district attorney may be deemed an elected county or precinct officer, his salary may not be

increased in mid-year unless he invokes the grievance procedure provided by section 2(d) of article 3912k.

We believe it is clear that a criminal district attorney is a district officer rather than a county officer. A criminal district attorney is one "class or kind of district attorneys." *Hill County v. Sheppard,* 178 S.W.2d 261, 263 (Tex. Sup. 1944). Furthermore, the term "criminal district attorney" means simply "an attorney for a criminal district court." *Id.,* In *Williams v. Huntress,* 272 S.W.2d 87 (Tex. Sup. 1954), the Supreme Court held that even a one-county district court is a "district office." *Id.,* at 88. *See also Bounds v. McCallum,* 52 S.W.2d 1047, 1049 (Tex. Sup. 1932).

In addition, article 6.05c, Texas Election Code, in listing the order in which offices must appear on an election ballot, groups the offices into five categories: federal, statewide, district, county and precinct. The offices of both district attorney and criminal district attorney are included under the category of "district office." Finally, article 3912e, V.T.C.S., repeatedly recognizes a distinction between "district officers," "county officers," and "precinct officers." Sections 1, 19(h), 19(l), 19(n), 19(q). We believe that these statutory references confirm the implication of *Williams v. Huntress, supra,* that a criminal district attorney, even though his district comprises only a single county, is a district officer rather than a county or precinct officer. Accordingly, it is our opinion that the salary payments to the criminal district attorney are not controlled by section 2 of article 3912k.

SUMMARY

A criminal district attorney is a district officer rather than a county or precinct officer and, as such, is not required to follow the grievance procedure of article 3912k in order to receive a salary increase.

Very truly yours,

.....

John L. Hill
Attorney General of Texas

APPROVED:

.....

David M. Kendall, First Assistant

.....

C. Robert Heath, Chairman
Opinion Committee

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-623 (2)
85-646 (2)

In The
Supreme Court of the United States
October Term, 1985

DALLAS COUNTY, TEXAS, ET AL.,
Petitioners,

v.

STEPHEN C. CRANE,
on behalf of himself
and others similarly situated,
Respondent.

RESPONDENT'S JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Douglas R. Larson
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4188

QUESTIONS PRESENTED FOR REVIEW

(In 85-623)

1. Whether a Texas District Attorney is a State officer whose acts constitute state policy, not county policy, requiring attorney fees under 42 U.S.C. § 1988 to be assessed against the state if Respondent Crane is a prevailing party and prohibiting the assessment of damages under 42 U.S.C. § 1983 because of Prosecutorial and/or Eleventh Amendment immunity?

2. Whether a misdemeanor justice system which authorizes prosecution by information based on affidavit of complaint followed by the clerk issuing a capias writ and further provides an accused the right to a determination of probable cause at his first appearance before a judicial officer prior to extended detention is in violation of Texas statutes and/or the Fourth Amendment?

(In 85-646)

1. Whether a Texas District Attorney is immune from a civil claim for damages arising from the performance of his official duties to initiate or present the state's case in a criminal prosecution?

2. Whether a Texas District Attorney is a state officer whose official acts constitute state action and is accordingly immune from a civil claim for damages under the Eleventh Amendment to the United States Constitution?

LISTING OF PARTIES

PETITIONERS, No. 85-623:

Dallas County, Texas
Ben Ellis, Judge, Dallas County Criminal Court No. 1
John Orvis, Judge, Dallas County Criminal Court No. 2
Mike Schwille, Judge, Dallas County Criminal Court No. 3
Berlaind Brashear, Judge, Dallas County Criminal Court No. 6
John McCall, Judge, Dallas County Criminal Court No. 7 (replaced Chuck Miller)

ATTORNEYS FOR PETITIONERS, No. 85-623:

Law Offices of Earl Luna, P.C.
Earl Luna
Robert E. Luna
Mary Milford

PETITIONER, No. 85-646:

Henry Wade, Dallas County District Attorney

ATTORNEY FOR PETITIONER, No. 85-646:

Peter Harlan, Dallas County Assistant Criminal District Attorney

RESPONDENTS:

Stephen C. Crane, on behalf of himself and others similarly situated

ATTORNEY FOR RESPONDENTS:

Johnston, Larson & Trantham
Douglas R. Larson

INTERESTED PARTIES:

State of Texas
Earl Bullock, Dallas County Clerk
L. E. Murdoch, Former Dallas County Clerk

ATTORNEYS FOR INTERESTED PARTIES:

Jim Mattox, Attorney General
Larry King, Assistant Attorney General
Sue LaGarde, Dallas County Assistant Criminal District Attorney

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No. 85-623
85-646

In The
Supreme Court of the United States
October Term, 1985

DALLAS COUNTY, TEXAS, ET AL.,
Petitioners,
v.
STEPHEN C. CRANE,
on behalf of himself
and others similarly situated,
Respondent.

RESPONDENT'S JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW Respondent STEPHEN C. CRANE, on behalf of himself and others similarly situated and files their Brief in Opposition to Petitioners' petitions for

Writ of Certiorari, and in support thereof would respectfully show the following:

GROUNDS FOR JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on May 2, 1985, and is reported at 759 F.2d 412. Petitioners' respective Petitions for Rehearing and Suggestion for Rehearing En Banc were denied on July 22, 1985, and Petitioners' respective Petition for a Writ of Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Respondent questions the standing of some of the petitioners before this Court and that is discussed herein.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983

42 U.S.C. § 1988

Fourth Amendment to the United States Constitution

Eleventh Amendment to the United States Constitution

STATEMENT OF THE CASE

The facts stated in both Dallas County, et al. and Henry Wade's Petitions for Certiorari are essentially accurate, but both are shaded by counsel to place their cause in the most favorable light in an attempt to create issues that do not actually exist. Respondent ,Crane adds the following which, when read in conjunction with both Petitioners' statements of the case more accurately portrays the true, factual context in which this case arose and was later developed.

STEPHEN C. CRANE, a practicing lawyer in Dallas County, Texas, was arrested on April 21, 1980, in Dallas County, Texas, by City of Dallas police officers, on the authority of a warrant issued by the Dallas County Clerk. (r. at 7) Crane was charged with violating Article 43.23 of the Texas Penal Code, "Distribution of Commercial Obscenity", a misdemeanor. (r. at 5, 13)

Crane's arrest arose as a result of an investigation by the Dallas Police Department during March-April 1980, of a movie house in Dallas, Texas, known as the Crystal Theater. (r., vol. XI at 120-121) In the course of the vice investigation, Dallas police officer Buchanan requested and received a copy of the Articles of Incorporation for a corporation bearing the same or similar name as the Crystal Theater from the Texas Secretary of State. (r., vol. XI at 120-121) The Articles of Incorporation had been filed in the Texas Secretary of State's office on May 29, 1979. Also in the course of the investigation, another Dallas police officer, Armando Perez, visited the Crystal Theater in Dallas, Texas, observed films being shown and concluded that they were legally obscene. (r., vol. XI at 223, 231)

The Dallas Police identified Crane as a suspect for the Commercial Obscenity charge solely because the Crystal Theater Inc.'s Articles of Incorporation named Crane as an initial director of that corporation. (r., vol. XI at 132, 231-232) The appearance of Crane's name on the Articles of Incorporation constituted Crane's only contact or association or dealing with Crystal Theater, Inc., with the exception of his subsequent resignation as an initial director of the corporation in 1979 when the Texas Secretary of State returned the filed Articles of Incorporation to the lawyer who had prepared them. (r. at 4) It is common in Texas corporate practice for initial directors to resign after the Articles of Incorporation are returned to the lawyer who prepared and sent them to the Texas Secretary of State. The incorporation was a routine and clerical task. Crane was totally unaware that in March and April, 1980, Crystal Theater, Inc., was operating a moving picture theater in the City of Dallas, Texas. (r. at 4) Neither the Dallas police nor prosecutor Wade had any evidence that Crane knew about the "obscene movies" or even that Crane knew about the theater. Crane's name was on the Articles of Incorporation because a lawyer who shared office space with Crane had placed Crane's name on the Articles or Incorporation without Crane's prior knowledge or approval.

Without further investigation and based solely upon the fact that Crane's name appeared on the Articles, the Dallas Police Department subsequently sent to the Dallas County Criminal District Attorney's office a case report alleging that Crane was engaged in "Commercial Obscenity." (r., vol. XI at 154, 155, 223, 231) The Dallas County Criminal District Attorney's office reviewed the case report submitted by the Dallas Police and promptly pre-

pared a criminal information and accompanying affidavit (complaint).[1] The District Attorney's review constituted little more than directions to his secretary on which affidavit and information form to select and directions to the secretary to fill in the appropriate blanks in a snap out, partially preprinted form containing carbon paper that, when typed, simultaneously prepared the "affidavit" and an "information". The blanks were filled in with Crane's full name, the date of the alleged offense and the appropriate conclusionary language from the Texas Penal Code which constituted the offense of commercial obscenity. (r., vol. XII at 497) The criminal information and conclusionary affidavit charging Crane with commercial obscenity were then filed with the Dallas County Clerk L.E. Murdock's office.

Upon receipt of the criminal information and supporting conclusionary affidavit from Wade's office, an assistant Dallas County clerk without any judicial supervision prepared a capias arrest warrant simply by typing the name of the accused (Crane) and the charge on a (capias) arrest form which was then signed or stamped with the clerk's signature and affixed with the County Clerk's seal. The (capias) warrant was given to the police, which directed the arrest of the accused. (r., vol. XII at 614) The clerk's function in issuing the writs was purely ministerial or administrative in nature. (r., vol. XIII at 616, 618) Neither the clerk or deputy clerk made any determination of probable cause before issuing the (capias) arrest war-

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[1] In Texas Criminal Practice, the term "complaint" and "affidavit" are often used interchangeably and are used in that way in this case. See, Texas Code of Criminal Procedures, Art. 2.04, 2.05, 15.04, 21.22, 27.03(1).

rants. Neither the Clerk, L.E. Murdock, nor any of his deputies had any legal training or legal supervision to make any sort of probable cause determination. None of the assistant clerks were assigned to a particular judge or employed by one. County Clerk L. E. Murdock's office followed the same procedure for the issuance of capias arrest warrants which had been in effect for many years. (r., vol. XIII at 614, 615) This procedure was established by Wade, and was totally under Wade's control and supervision. This same procedure was followed 800-1000 times a week in each case involving a misdemeanor, and each time a warrant was issued. Wade has been the Dallas County District Attorney continuously since 1951. Virtually all the affidavits filed with the Dallas County Clerk by Wade's office supporting the information were conclusionary in nature. No "neutral and detached magistrate" in the above-outlined procedure determined that probable cause existed for the issuance of any of these arrest warrants unless one concludes that Wade's office unlawfully assumed that role. (r. at 295)

Crane's arrest came about as a result of the arrest warrant procedure described above, on the authority of the (capias) arrest warrant issued by the Dallas County Clerk. (r., vol. XII at 171, 172) Despite the fact that the Dallas County Jail sits on top of the Dallas County Courthouse and Crane was arrested on a weekday when the Courthouse was open for business; Crane was taken directly to the Dallas County jail where he spent approximately four hours until a bail bond was posted for him and he was released. (r., vol. XXIII at 728)

On April 28, 1980, after Crane had demanded a trial, the criminal charges of commercial obscenity were dis-

missed at the request of the Dallas County Criminal District Attorney's office due to insufficient evidence, and because of the belated discovery of Crane's lack of connection with the theater. (r. at 265)

On July 30, 1980, Crane filed this action in the Federal District Court for the Northern District of Texas, Dallas Division. (r. at 1) After the District Court had indicated that the procedure outlined above for the issuance of capias warrants was unlawful; Wade issued directives which had the ultimate effect of changing the system which then required "probable cause affidavits" and review of each "probable cause affidavit" by a detached, neutral magistrate before any (capias) arrest warrant would issue.[2]

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SUMMARY OF ARGUMENT

Respondent Crane submits that both petitions for certiorari are frivolous and without merit and neither petition truly presents this Court with any issue that this Court has not previously considered and/or settled. Respondent contends that this Court has already, in effect, determined that a Texas county is not entitled to immunity pursuant to the Eleventh Amendment, and in any event, neither petitioner has presented any reason in law or fact for this Court to extend the protection of the Eleventh Amendment to Dallas County. Nor has either Petitioner stated any

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[2] This statement of the case is an expansion of the District Court's findings of fact and a further elaboration of the facts recited by the Court of Appeals at 759 F.2d 414-415.

real reason to seriously consider extending the Eleventh Amendment to Dallas County prosecutor Wade. Wade is not himself the State of Texas, nor is he a state official with state-wide authority. In effect, Wade's prosecutorial immunity has not been violated because Wade is not paying Crane's damages. Dallas County is. Further, Wade's responsibility was not bottomed upon his decision to prosecute Crane, but because he caused the arrest of Crane and his class by his establishment of an unconstitutional system of issuing arrest warrants without probable cause or probable cause determinations by a detached, neutral magistrate. Respondent also suggests that the Court of Appeals for the Fifth Circuit did not only hold Dallas County responsible because of Wade's conduct but also because of the conduct of the County Clerk L. E. Murdock. Murdock's office issued the warrants which caused Crane and his class to be arrested. Respondent also contends that the petition for certiorari filed by Dallas County, et al. is defective for two reasons: Respondent believes that the Dallas County Criminal Court Judges have no standing to be before this Court and counsel for Petitioner Dallas County has apparently misread this Court's decisions to sanction the issuance of an arrest warrant without probable cause and without the involvement of a detached, neutral magistrate in the decision to issue a warrant. Instead of attempting to respond just to the questions that Petitioners assert are reasons for this Court to issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit, Respondent has broken down his brief in response into six sections, which deal separately with each purported issue raised by the respective petitioners. Fortunately for the Respondent, the Court of Appeals opinions found at

759 F.2d 412 and 766 F.2d 193 remain the best brief in response to the Petitioners' claims.

ARGUMENT

I. There Is No Reason In Law Or In Fact To Grant Dallas County Eleventh Amendment Immunity.

It is very difficult to accurately ascertain what Petitioners are actually saying in their petition in regards to the Eleventh Amendment issue they insist merits review by this Court. Several cases have been cited by Petitioners to the effect that a federal court is required to look to state law as a source to determine the status of an entity in relation to the Eleventh Amendment.[3] Respondent does not quarrel with this proposition. None of the cases cited by Petitioner Dallas County conflict with the Court of Appeals opinion in this case. Nor does Respondent take any particular issue with any of them. The Court of Appeals carefully considered each of Petitioner's Texas statutory and Texas case authorities with regard to the Eleventh Amendment status of Dallas County. Each case cited by Petitioners Dallas County, et al., was carefully analyzed

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[3] *Blake v. Kline*, 612 F.2d 718 (1979), cert. denied 447 U.S. 1921, 100 S.Ct. 3011 (1980); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (1984), cert. denied 105 S.Ct. 796 (1985); *Fouche v. Jekyll Island—State Park Authority*, 713 F.2d 1518 (11th Cir. 1983); *Sessions v. Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981); *Hander v. San Jacinto Junior College*, 519 F.2d 273 (5th Cir. 1975); *Unified School District No. 480 v. Epperson*, 583 F.2d 1118 (1978); *FitzPatrick v. Bitzer*, 519 F.2d 559 (1975), affirmed in part, reversed in part 427 U.S. 445, 96 S.Ct. 2666 (1976); *Matheson v. Long Island Park Comm'n*, 442 F.2d 566 (2nd Cir. 1971); *Adden v. Middlebrooks*, 688 F.2d 1147 (1982), and *Korgich v. Regents of New Mexico School of Mines*, 582 F.2d 549 (10th Cir. 1978).

and rejected as requiring Eleventh Amendment protection for Dallas County.[4]

Totally absent from Dallas County's Petition are any reasons which can be subjected to analysis as to why a Texas county is entitled to Eleventh Amendment immunity. When this case was before the Court of Appeals, Dallas County attempted to claim that a Texas county is unique and, for that reason, it should be given Eleventh Amendment protection. The Court of Appeals correctly rejected this argument because there is really nothing unique about a Texas county. In any event, this Court has stated in relation to state law resources in relation to an Eleventh Amendment claim that a federal court must look "beyond simpl[e] . . . generalization to make a 'detailed examination' of the powers of a county." *Moor v. County of Alameda,* 411 U.S. 693 at 719, 93 S.Ct. 1785 at 1860 (1979). Further, the Court of Appeals correctly pointed out that this Court has already implicitly rejected Eleventh Amendment immunity for a Texas county in *Avery v. Midland County,* 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed. 2d 45 (1968). This Court in *Avery* stated as follows:

> The Texas commissioners courts are assigned some tasks which would normally be thought of as "legislative," others typically assigned to "executive" or "administrative" departments, and still others which are "judicial". In this regard, *Midland County's Commissioners Court is representative of most of the general governing bodies of American cities, counties,*

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[4] The Texas Attorney General doesn't believe that Dallas County is a state agency. In fact, his position throughout this litigation was that Dallas County was not entitled to Eleventh Immunity.

> *towns, and villages.* One knowledgeable commentator has written of "the states' varied, pragmatic approach in establishing governments." R. Wood, in Politics and Government in the United States 891-892 (A. Westin ed. 1965). That approach has produced a staggering number of governmental units—the preliminary calculation by the Bureau of the Census for 1967 is that there are 81,304 "units of government" in the United States—and an even more staggering diversity. Nonetheless, while special-purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs. *In many cases, citizens reside within and are subject to two such governments, a city and a county. The Midland County Commissioners Court is such a unit.*

390 U.S. at 482-83, 88 S.Ct. at 119-20. [emphasis added] [footnotes omitted]

The Eleventh Amendment application to counties has been rejected in several other cases brought before the Supreme Court. *Lincoln County v. Luning,* 133 U.S. 529, 20 S.Ct. 363, 33 L.Ed. 766 (1890); *Lake Country Estates, Inc., v. Tahoe Reg. Plan,* 440 U.S. 391, 99 S.Ct. 1171 (1979); *Moor v. County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785 (1973); and *Edelman v. Jordan,* 415 U.S. 651, 667 n.12, 94 S.Ct. 1347, 1358 n.12 (1974) ("a county does not occupy the same position as a State for the purposes of the Eleventh Amendment".

In light of the above authority, the federal courts have formulated several tests or criteria to determine the applicability of the Eleventh Amendment, e.g., *Tradigrain, Inc. v. Mississippi Port Authority,* 701 F.2d 1131 (5th Cir. 1982), *Laje v. R.E. Thomason General Hospital,* 665 F.2d

724 (5th Cir. 1982); *Huber Hunt & Nichols v. Architectural Stone Co.*, 625 F.2d 22 (5th Cir. 1980). These criteria are:

1. whether the entity has been granted the right to hold property;
2. whether the entity has the express authority to sue and be sued in its corporate name;
3. the extent of its independent management authority;
4. the treatment of the entity by the state court;
5. whether the state is responsible for the entity's debt; and,
6. whether the entity and not the state will be primarily responsible for any judgment against it.

The answer to each of these is unquestionably not favorable to Dallas County's position that it is entitled to Eleventh Amendment protection.

Under Texas law, a county is given "corporate powers" and is expressly declared to be "a body corporate and politic". Tex. Rev. Civ. Stat. Ann. Art. 1572 (Vernon 1962). In this capacity, a county may sue and be sued in its own name. Tex. R. Civ. P. 33; Tex. Rev. Civ. Stat. Ann. Arts. 1573, 1578, 1579, 1581 (Vernon 1962). In addition, the county, and apparently the county alone, is liable for all claims against it. Tex. Rev. Civ. Stat. Ann. Arts. 1575 (Vernon 1962) and 2351, § 10 (Vernon 1971). Additionally, the county, acting through its commissioners court, may employ an attorney to assist in the prosecution of claims and suits and may pay for these services out of county funds.[5] *Adams v. Seagler*, 112 Tex. 583, 250 S.W.

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[5] Earl Luna, counsel for Dallas County, et al. herein is not a county official, but a lawyer hired by Dallas County pursuant to this authority.

413 (1923); *O'Quinn v. McVicker,* 428 SW2d 111, 112 (Tex. Civ. App., Beaumont 1968, ref'd n.r.e.). Moreover, a contract by the county employing such an attorney would not bind the State for attorneys fees thereof. *Landman v. State,* 97 SW2d 264 (Tex. Civ. App. El Paso 1936, writ ref'd n.r.e.). At least as to a claim for money allegedly owing to its general fund—the fund which would satisfy a judgment in this case—a county is not exempt from a defense of limitations, as the state would be. *Linz v. Eastland County,* 39 SW2d 599 (Tex.Comm'n.App. 1931, holding approved).

A Texas county may also take, hold and dispose of property for county uses, or for uses that serve the public good. Tex. Rev. Civ. Stat. Ann. Arts. 1576 and 1577 (Vernon 1962). County boundaries may be reduced by the State legislature, but a county may not be abolished altogether. Tex. Rev. Civ. Stat. Ann. Art. 1545 (Vernon 1962); Tex. Const. Art. 9, § 1. If a part of an existing county is to be added to another county by the State, a vote of the electors of the counties affected is necessary. Tex. Rev. Civ. Stat. Ann. Art. 1555-62 (Vernon 1962).

A county may own its own buildings, Tex. Rev. Civ. Stat. Ann. Art. 1603 (Vernon 1962), or it may lease them, Tex. Rev. Civ. Stat. Ann. Art. 2370 (Vernon 1971). It may remodel, improve or equip its facilities on its own motion. Tex. Rev. Civ. Stat. Ann. Art. 2370b (Vernon 1971). Likewise it may dispose of these assets by its own volition. Tex. Rev. Civ. Stat. Ann. Art. 2370e (Vernon 1971). It is entitled to acquire, purchase or use such personal property, appliances or equipment as it deems appropriate. Tex. Rev. Civ. Stat. Ann. Art. 2368a-2 (Vernon 1962).

Counties may enter into contracts, Tex. Rev. Civ. Stat. Ann. Arts. 1580 (Vernon 1962) and 2351 (Vernon 1971) and 2370c-3 (Vernon Supp. 1982) and are liable for their own debt, Tex. Rev. Civ. Stat. Ann. Arts. 1546, 1547, 1548, 1549, and 1575 (Vernon 1962). A county may engage in commerce with the United States, Tex. Rev. Civ. Stat. Ann. Art. 2351 (Vernon 1971), or with another county or city in an adjoining state, Tex. Rev. Civ. Stat. Ann. Art. 2370c-3 (Vernon Supp. 1985).

Financially, counties are empowered to levy and collect a tax for county purposes. Tex. Rev. Stat. Ann. Art. 2352 (Vernon 1971). Such revenues are maintained in a separate county treasury. Tex. Const. Art. 8, § 9. Also, the County Commissioner's court may establish a fiscal or calendar year for the county. Tex. Rev. Civ. Stat. Ann. Art. 1644e (Vernon Supp. 1985). The county has authority to formulate rules and regulations governing the work hours, vacations, holidays, sick leave, medical care, hospitalization, pensions and accident insurance of its employees. Tex. Rev. Civ. Stat. Ann. Art. 2372h (Vernon 1971). It may establish its own independent civil service commission and rules. Tex. Rev. Civ. Stat. Ann. Art. 2372h-6 (Vernon Supp. 1985). Moreover, Texas law states that a county is not to be considered a state agency with respect to laws governing the conduct of state officers and employees. Tex. Rev. Civ. Stat. Ann. Art. 6252-9b (Vernon Supp. 1985) (entity whose authority is limited to a geographical portion of the state is not a "state agency").

In the area of law enforcement, Texas recognizes that county sheriffs and constables have a separate status from state officers, and their authority is derived from the county, not the state. Tex. Code Crim. Proc. Ann. Art. 2.12 and

18.17 (Vernon 1977); *City of Waco, Texas v. Bridges,* 710 F.2d 220 (5th Cir. 1983), cert. denied — U.S. —, 104 S.Ct. 1414, 79 L.Ed. 741 (1984) (the Texas legislature separately recognized "state or county peace officers" in Art. 18.17 to indicate the source of the police officer's power). And under Art. 18.17, a seizure of personal property by a state or county officer accrues to the county and the State has no interest therein. *City of Waco, Texas v. Bridges, supra.*

Finally, unlike state agencies which have jurisdiction across political boundaries, Texas counties have no power or jurisdiction beyond the limits of the county itself. Tex. Const. Art. 5, § 18; *Burke v. Hutcheson,* 537 SW2d 312 (Tex. Civ. App. — Eastland 1976, writ ref. n.r.e.).

The above provisions strongly indicate that Texas counties are independent political subdivisions and not an agency or arm of the state. Most persuasive is the fact that ultimate financial responsibility for the judgment in this case is borne not by the state, but by the County itself. Therefore, Eleventh Amendment protection of the County is not necessary "in order to protect the state treasury from liability that would have . . . essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc., v. Tahoe Regional Planning Agency, supra,* 440 U.S. at 401, 98 S.Ct. at 1177.

II. The Court Of Appeals For The Fifth Circuit Has Not Violated Wade's Prosecutorial Immunity.

Contrary to the impression created purposely by both petitioners, Wade was not held responsible to Crane for damages because Wade decided to prosecute Crane. Wade was held liable to Crane because he was found responsi-

ble for establishing and maintaining the use of the Dallas County capias warrant system which failed to include constitutionally mandated Fourth Amendment procedures. These missing Fourth Amendment procedures require that an affidavit stating probable cause be submitted to a neutral, detached magistrate before a warrant can issue. *Coolidge v. New Hampshire,* 403 U.S. 443 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Aguilar v. Texas,* 378 U.S. 108 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Giordenello v. U.S.,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *U.S. v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 98 L.Ed. 436 (1948).

In *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), this Court held that prosecutors enjoy absolute immunity from civil liability for actions undertaken in their "quasi-judicial" capacity, which include initiating a prosecution, presenting evidence to a grand jury, and representing the government in a criminal trial. The Supreme Court in *Imbler v. Pachtman, supra,* expressly refused to reach the question of whether investigative or administrative duties of a prosecutor are shielded by absolute immunity, noting that several lower federal court decisions had held they are not. Not surprisingly, federal courts since *Imbler v. Pachtman* have continued to hold that when a prosecutor is involved in a nonadvocative or administrative function, such as the role played by Wade herein, the prosecutor only enjoys qualified immunity. *Gray v. Bell,* 712 F.2d 490 (D.C. Cir. 1983) cert denied — U.S. —, 104 S.Ct. 1599 (1984); *McSurely v. McClellan,* 697 F.2d 309 (D.C. Cir. 1982); *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979); *Jacobson v. Rose,*

592 F.2d 515 (9th Cir. 1978); *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983). Further, the actual participation by a prosecutor in an illegal arrest or an illegal search and seizure is not protected by absolute immunity. *McSurely v. McClellan, supra, Marrero v. City of Hialeah,* 625 F.2d 499 (5th Cir. 1980) and *Apton v. Wilson,* 506 F.2d 83 (D.C. Cir. 1974).

The cases[6] which petitioners allege conflict with the one at bar, and require Supreme Court intervention, all involve decisions by the prosecutor in either the initiation of a prosecution or representing the state in a criminal proceeding. None of these provide any reason to believe that the case at bar has been decided by a court of appeals which was ignorant of *Imbler v. Pachtman.* The prosecutor herein created an automatic arrest warrant which had nothing to do with his decision to prosecute or with his advocacy in court.

There was simply no basis or probable cause for Crane's arrest, and there was no one in Wade's automatic arrest warrant system who could insulate Crane (or his class) from illegal arrest. The mere fact that Crane's name appeared on the Articles of Incorporation does not in and of itself indicate Crane knew anything about the showing of obscene films by the theater almost a year after the forming of the corporation. While it may be a

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[6] *Sykes v. State of California,* 497 F.2d 197 (9th Cir. 1974); *Henzel v. Gerstein, et al.,* 608 F.2d 654 (5th Cir. 1979); *Prince v. Wallace,* 568 F.2d 1176 (5th Cir. 1976); *Taylor v. Kavanagh,* 640 F.2d 450 (2nd Cir. 1981); *Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675 (9th Cir. 1984); *Macko v. Byron,* 641 F.2d 447 (6th Cir. 1981); *Atkins v. Lanning,* 556 F.2d 485 (10th Cir. 1977).

good idea in theory for a member of a board of directors to know everything a corporation does; experience teaches us otherwise. Crane could not have been charged with knowledge or responsibility in any event, because Crane had resigned as a director almost a year before the police saw the obscene movies. The police were even unable to explain how they came to the conclusion that the Crystal Theater was operated by Crystal Theater, Inc.

Wade cannot legitimately claim that he had the authority to make arrest warrant decisions without a detached, neutral magistrate becoming involved. *Mancusi v. Deforte,* 392 U.S. 364, 885 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971).

Respondent contends that the Court of Appeals correctly stated the following in relation to Wade's responsibility:

> In its Memorandum Order of November 30, 1981, the trial court asked the defendants for "concrete proposals" for a new Dallas County system of issuing capias. Id. at 13. The judges and the District Attorney submitted such proposals; they were filed with the court on December 9 and 11, 1981, respectively. The District Attorney had begun to make changes in the system even before this, however. A A letter from the District Attorney to the Chief of Police of the City of Dallas, dated July 20, 1981, announces "I plan certain changes in the procedure for the filing of criminal cases with the Dallas County District Attorney's Office." A memorandum from the District Attorney to "All Police Departments and Agencies Filing Cases with the Dallas County District Attorney's Office", dated September 17, 1981, states "Certain changes in the procedure for the filing of criminal cases with the Dallas County District Attor-

> ney's Office are presently (sic) being implemented." A letter from the District Attorney to Judge Ellis of the Dallas County Criminal Court dated December 7, 1981, begins, "As a result of the recent decision by Judge Higginbotham in Cause No. CA3-80-0978-6, styled *Stephen C. Crane versus State of Texas, et al.*, the following is the form of action this office would like to take — with your cooperation." In none of these communications is there the slightest indication that the District Attorney acted other than independently; there is no hint of any perceived necessity by the District Attorney to consult with or invite the participation of any state official, for example, a member of the State Attorney General's Office. To the contrary, the record plainly shows that the District Attorney was alone responsible for the County system and could change it at will. This fact is implicit in the trial court's Order of February 4, 1982, denying injunctive relief because [B]eginning as early as June 1981, some five months before this court's Memorandum Order of November 30, 1981, defendants voluntarily changed the method used to issue capias in misdemeanor cases. Implementation of this change has proceeded at a steady pace. At all times, defendants have demonstrated by concrete action their good faith effort to achieve a sound and legally sufficient system.

Crane v. Texas, 759 F.2d 412 at 429

The Court of Appeals for the Fifth Circuit did not directly discuss the prosecutorial immunity issue because the Court of Appeals determined that Wade was the county official who was responsible for Crane's arrest and he alone established the procedures which led to Crane's arrest. The Court of Appeals also concluded that Dallas County would ultimately pay the damages because Wade

was acting in his official capacity as a county officer when the capias arrest procedures were established.[7]

No reasonable prosecutor,[8] in light of *Mancusi v. DeForte, supra,* and *Coolidge v. New Hampshire, supra,* could have believed that he was a neutral and detached magistrate that could make a probable cause determination for the issuance of an arrest warrant. As a practical matter, Wade's office was the only agency which could have attempted to ascertain probable cause under the challenged system herein, and he did not in any event even attempt to do that. The challenged system was designed by Wade to avoid a neutral magistrate's determination of probable cause by his creation of the automatic arrest warrant. Without doubt, Wade could have easily foreseen that the filing of an information and affidavit by his office through the County Clerk's office would re-

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[7] Needless to say, Dallas County is responsible because *Monell v. Department of Public Services,* 436 U.S. 568, 98 S.Ct. 2018, 56 L.Ed. 611 (1978) teaches us that an official (Wade) with policy-making powers renders the entity responsible for the damages. Texas Law gives Wade the authority to make all decisions for his office of county government.

[8] The requirement that an arrest warrant not issue except on probable cause determined by a neutral and detached magistrate is such a fundamental and indisputable constitutional and legal principle which must be included within the ambit of "clearly established" law envisioned by this Court in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982). There is no morass of conflicting law surrounding this essential tenet. Neither was there substantial confusion in the state of the law nor contrary legal authority on which Wade could rely at the time of Crane's arrest. In the District Court proceedings in the instant case, the jury found Wade "knew or should have known, that the procedure followed in the issuing of capias infringed on a clearly established constitutional right of Stephen Crane." (r. at 1002) Wade's personal liability is clearly fixed.

sult in Crane's illegal arrest, as well as cause an untold number of illegal arrests of the class of persons represented by Crane.

The purpose for the creation of prosecutorial immunity, which is to allow the prosecutor to operate without fear of retribution in his decision to prosecute and to allow the prosecutor to vigorously and fearlessly represent the public, actually disappears when viewed in the context of this case. This is so because the Court of Appeals has said that Wade was acting in his official capacity as a county official and Dallas County will ultimately pay the damages. Wade cannot legitimately say that he fears anything if he personally doesn't have to pay the damages. *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 57 L.Ed.2d 681 (1978); *Kentucky dba Bureau of State Police v. Graham,* — U.S. —, 105 S.Ct. 3099, 85 L.Ed.2d — (1985). This position is buttressed by this Court's decision in *Owen v. City of Independence, Mo.,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), wherein this court determined that qualified immunity or "good faith" on the part of the offending official was not a defense for the city (county). If the good faith of the city official in *Owen* is not an impediment for recovery from the city, neither should Wade's dubious claim of prosecutorial immunity be an impediment for recovery from Dallas County.

III. District Attorney Wade Is A Local And Not A State Official.

Totally absent from either of Petitioners' Application for Certiorari herein are any reasons for stating that prosecutor Wade is a state officer other than *Baker v. Wade,*

769 F.2d 289 (5th Cir. 1985). *Baker v. Wade* was cited for the proposition that a prosecutor represents the state in a criminal proceeding and is empowered to intervene in a federal lawsuit. Respondent does not quarrel with that proposition because that is true. But that should only be taken in the abstract sense, because Wade is not himself a political entity. Wade is just a lawyer representing a client which in this case happens to be the people of the State of Texas located in Dallas county. A lawyer who represents an entity does not himself become the entity because of his representation.

Wade is clearly a local official and the Court of Appeals for the Fifth Circuit correctly characterized him as such.

> Other and more significant factors, generally speaking, argue that he is a local official. He is elected by the voters of his district, usually one county. Tex.Const. Art. V, § 21. His major powers and duties—which concern the prosecution of serious crimes and which he exercises alone and without responsibility to the State Attorney General, who has no general prosecutorial powers—are limited to the territory of his district. He is paid by county funds, although these are partly reimbursed by the state. And the significance of the creation of his office by the State Constitution is diminished by the circumstance that other local offices are created by it as well. See *e.g.*, Article V, § 19 (Justice of the peace) and § 20 (County clerks). In sum, much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but limited in the exercise of those powers to the county, filled by its voters, and paid for with its funds. As for the case in hand, District Attorney Wade was responsible for the county policy attacked and conclusively demonstrated his ability to alter it on his own by doing that very thing.

> For present purposes, then, we conclude that he is properly viewed as a county official, elected by its voters and responsible for its relevant policy. In such circumstances, we see no injustice in holding the County responsible for his actions of this sort. Doubtless he is also in some senses an officer of the State (or of the state), at least as ultimately deriving the powers of his office from that source. But even were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements. At all events, his immunity or want of it is of little practical consequence. The joint and several judgment against him in his official capacity only and against the county will expend itself on the county treasury. See, *Kentucky, dba Bureau of State Police, Petitioner v. James E. Graham, et al.*, — U.S. —, 105 S.Ct. 3099, 85 L.Ed.2d — (1985).

Crane v. State of Texas, 766 F.2d at 195.

IV. There Are Other Reasons To Justify The Result Reached By The Court Of Appeals.

Even if one concludes that Wade's automatic warrant system comes within the ambit of *Imbler v. Pachtman, supra*, there are still reasons for requiring Dallas County to pay the damages and to uphold the result reached by the Court of Appeals for the Fifth Circuit. In the trial court, Plaintiff Crane sought damages from County Clerk Murdock as well as Dallas County and prosecutor Wade.

Both the County and the clerk were held not to be responsible for the damages by the District Court.[9] Both of these issues were presented to the Court of Appeals. The Court of Appeals did not mention very much about the clerk in its opinion, probably because the Court of Appeals had already determined that Dallas County would ultimately pay the damages, etc. The Court of Appeals quite clearly meant to make all the Defendants liable to Crane. "Crane contends that the trial court erred in holding all Defendants immune from liability for money damages. We agree, although for reasons different from those offered by Crane." *Crane v. State of Texas*, 759 F.2d at 427. County Clerk Murdock is clearly a local county official with the power to make policy for his office in accordance with *Monell v. Department of Public Services*, 436 U.S. 568, 98 S.Ct. 2018, 56 L.Ed. 611 (1978). Murdock's

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[9] The jury did find that Murdock acted in "good faith". (r. at 1001) It should be noted that the issue presented to the jury used the subjective "good faith" standard. (r. at 993) In light of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982), the issue as presented was incorrect and should be analyzed in conformity with that opinion. Murdock cannot avoid personal liability for constitutional violations by claiming "good faith" where the law was clearly established. *Wood v. Strickland*, 420 U.S. 308 (1975). In the instant case, the law and the facts do not even support a good faith immunity defense. Murdock knew, or should have known, that a warrant of arrest could not issue without a finding of probable cause by a neutral and detached magistrate. There was no contrary authority upon which Murdock could have relied causing him to reasonably believe he had lawful authority to issue warrants. Murdock's acts were taken in clear disregard for the constitutional rights of Crane and those in his class. The record clearly indicates Murdock issued the warrants only because that was the way it was done before he became the clerk in 1976 and he just continued the procedure. Murdock was totally ignorant of the constitutional limitations on his job and said he relied totally on Wade to apprise him of any legal problems. (r., VIII 610-626)

good faith does not cause any reason to reverse the decision to require Dallas County to pay the damages. *Owen v. City of Independence,* 580 F.2d 925 (8th Cir. 1977); remanded 438 U.S. 902 (1978) (in light of *Monell, supra;* on remand 589 F.2d 335 (8th Cir. 1978) (holding no governmental liability based on good faith defense); rev. 445 U.S. 622, 100 S.Ct. 1398 (1980) (holding that a municipality has no immunity from liability flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability). Murdock is an elected official elected by residents of Dallas County only. Art. 5 § 20, Texas Constitution. Vacancies in the county clerk's office are filled by the County Commissioners. Tex. Rev. Civ. Stat. Art. 1935, Tex. Const. Art. 5 § 20. The county clerk takes an oath and posts a bond payable to the county. Tex. Rev. Civ. Stat. Art. 1937 § 3. The premiums on the bond are payable out of county funds. Tex. Rev. Civ. Stat. Art. 1937 § 5. As exemplified by the status of the County Clerk under Texas Law, Murdock's acts then become the will of the entity (Dallas County) as exercised by the official elected directly by its citizens to perform the duties of county clerk. Thus, it is appropriate to require Dallas County to be responsible for the damage caused, at least in part, by one of Dallas County's own officials.

> Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. [citations omitted] The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended

> actions to err on the side of protecting citizens' constitutional rights. [footnote omitted] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. [footnote omitted]

Owen v. City of Independence, Missouri, 445 U.S. at 652, 100 S.Ct. at 1416, 63 L.Ed.2d at 694 (1980).

For a further discussion in regard to a Texas county official's responsibility under *Monell,* see *VanOotenghem v. Gray,* 584 F.Supp. 897 (D.C. Houston, 1984); 628 F.2d 488 (5th Cir. 1980); 640 F.2d 12 (5th Cir. 1981); 654 F.2d 304 (5th Cir. en banc 1981), cert. denied 455 U.S. 897, 102 S.Ct. 1255 (1982).

V. The Petitioners Actually Seek To Have This Court Consider The Repeal Of The Fourth Amendment In Their Petition For Certiorari.

Petitioners Dallas County, et al. are apparently asking this Court to repeal the Fourth Amendment of the United States Constitution. Needless to say, the Fourth Amendment does not exempt Dallas County from its application, nor does it exempt the capias arrest warrant from its application. Lest the petitioners forget, the Fourth Amendment clearly states that ". . . no warrant shall issue, but upon probable cause . . ." Not even *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) stands for the proposition that an arrest warrant need not be supported by a "probable cause affidavit" and further *Gerstein* does not approve of the dispensing with a neutral, detached magistrate in the determination of probable cause before a warrant can issue. In truth, *Gerstein*

supports Crane's position, because this Court said in *Gerstein* that a prosecutor may not assume that an information is in of itself a determination of probable cause. Id. at 116-118. Further, Justice Powell in *Gerstein* stated the following:

> . . . In *Albrecht v. United States*, 273 U.S. 1, 5; 47 S.Ct. 250, 251; 71 L.Ed. 505 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment. . . . Id. 420 U.S. 117.

Petitioners Dallas County et al. wish this Court to believe that *Gerstein v. Pugh* authorizes the issuance of an arrest warrant without probable cause and without a probable cause determination before a neutral magistrate, but only upon the decision of the Dallas County District Attorney based on a conclusionary affidavit notarized by him. Petitioners' apparent claim that a post-arrest determination of probable cause is acceptable and constitutional in the factual context of this case is not what *Gerstein* holds. Petitioners' proposition is so absurd as to cause Respondent to wonder if Petitioners have read the same case as Respondent.[10]

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[10] The cases of *Dommer et al. v. Hatcher*, 427 F.Supp. 1040 (N.D. Indiana, 1975) and *Dommer v. Crawford*, 653 F.2d 289 (7th Cir. 1981) cited by Dallas County, et al. as allegedly conflicting with this case are also based on petitioners wrongfully held assumption that an arrest without probable cause can be alleviated by a post-arrest visit to a magistrate.

As if the above is not enough, Petitioner Dallas County, et al. wishes this Court to believe that *Shadwick v. City of Tampa* 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed2d 783 (1972) has been overlooked by the Court of Appeals and conflicts with the Court of Appeals opinion herein. This is patently false. Apparently, Petitioner has failed to note that the city clerks in *Shadwick* were supervised by a judge, and the city clerks in *Shadwick* were apparently presented with an affidavit stating probable cause and were deemed capable of making probable cause determinations. None of these factors are even remotely present herein. Further, the Tampa City Charter authorized the clerks to determine probable cause and that is not the case here. *Knox v. State,* 586 S.W.2d 793 (Tex.Crim.App. 1980); *Sharp v. State,* 677 S.W.2d 512 (Tex.Crim.App. en banc 1984).[11]

VI. Not All The Petitioners Have Standing To Seek Further Appeal By A Writ Of Certiorari.

Neither the Orders/judgment rendered by the District Court, nor the Opinions/order of the Court of Appeals for the Fifth Circuit give any reason whatsoever for the Dallas County Criminal Court Judges, i.e., Ben Ellis, John Orvis, Mike Schwille, Berlaind Brashear, or John McCall to further appeal this cause by a writ of certiorari because

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[11] Throughout this litigation, the Petitioner-defendants have taken the position that the Texas Code of Criminal Procedure authorizes the county clerk to issue capias warrants without an indictment. Art. 23.04 of the Texas Code of Criminal Procedure clearly states the contrary. "In misdemeanor cases, the capias or summons shall issue from a *court* having jurisdiction."

nothing has been done to them which would give them any reason to believe they have been harmed.[12] The Court of Appeals correctly noted the status of the Judges' appeal in the following footnote found at page 421 of the Court's Opinion:

> "In any event, the ground of the judges' appeal is by no means clear. They have been assessed neither with damages nor with attorneys' fees; no declaratory or injunctive relief has been granted against them. We are thus at a loss as to what the judges are appealing from." *Crane v. State of Texas,* 759 F.2d at 421.

For what appears to be obvious to everyone except the Dallas County Criminal Court judges, there simply is no reason for them to seek an application for a writ of certiorari.

REQUEST FOR ATTORNEY'S FEES

Respondent hereby requests the Court to establish and award an attorneys' fee for services performed on this matter subsequent to the Fifth Circuit's judgment. In the alternative, Respondent requests remand to the trial court for this purpose.

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[12] Two of the original County Criminal County Judges named as defendants herein i.e., Tom Price and Harold Entz, apparently elected not to be involved in any appeal either to the Court of Appeals or to this Court. Perhaps they recognized the folly of the decision to appeal.

CONCLUSION

For the reasons stated above, as well as the reasons contained in the opinions rendered by the Court of Appeals for the Fifth Circuit, petitioners have failed to present any substantial or meritorious reason for granting their respective applications for certiorari, nor have petitioners stated any reasons to believe that the Court of Appeals opinions herein truly conflict with any other decision of any of the several Courts of Appeals. Further, petitioners have not demonstrated any reason in law to believe that this Court should exercise its supervisory powers over the Court of Appeals. Therefore, Respondent requests that both applications in all things be denied.

Respectfully submitted,

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